No. 88-1595-CFX
Status: GRANTED

Title: Kaiser Aluminum & Chemical Corporation, et al., Petitioners
v.
Joseph A. Bonjorno, et al.

Docketed:
March 30, 1989

Court: United States Court of Appeals for the Third Circuit

Vide:
88-1771

Counsel for petitioner: McElroy,Richard P.

Counsel for respondent: Reath,Henry T.

Entry	Date	Note	Proceedings and Orders
1	Mar 30 1989	G	Petition for writ of certiorari filed.
2	Apr 28 1989		Brief of respondent Bonjorno, et al. in opposition filed.
3	May 8 1989		Reply brief of petitioners Kaiser, et al. filed.
4	May 12 1989		Supplemental brief of respondents Bonjorno, et al. filed.
5	May 30 1989		DISTRIBUTED. June 15, 1989
6	Jun 19 1989		Petition GRANTED. The case is consolidated with 88-1771, and a total of one hour is allotted for oral argument. **********
7	Aug 2 1989		Joint appendix filed.
8	Aug 2 1989		Brief of petitioners Kaiser, et al. filed.
10	Aug 28 1989		Record filed.
		*	Certified copy of original record, 8 boxes, received.
9	Sep 1 1989		Brief of respondents Bonjorno, et al. filed.
11	Sep 26 1989		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1989. (CONSOLIDATED WITH 88-1771) (2ND CASE)
12	Sep 29 1989		CIRCULATED.
13	Oct 2 1989	X	Reply brief of petitioners Kaiser, et al. filed.
14	Nov 6 1989	D	Motion of respondents /cross-petitioners Bonjorno, et al. to open oral argument and to present a summary outline of issues for use in determining the order of oral argument filed.
15	Nov 16 1989		Opposition of petitioners to motion of petitioners Bonjorno, et al. filed.
16	Nov 27 1989		Motion of respondents /cross-petitioners Bonjorno, et al. to open oral argument and to present a summary outline of issues for use in determining the order of oral argument DENIED.
17	Dec 4 1989		ARGUED.

88-1595

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In this private antitrust case, which was commenced in 1974, respondents ultimately secured a judgment of $9,567,939 after several retrials and intervening appellate proceedings. After payment of the judgment, respondents claimed interest on the judgment under 28 U.S.C. § 1961, as amended in 1982. The 1982 amendment substituted for the various state court interest rates a uniform federal rate of interest on judgments keyed to United States Treasury bill auction prices. This case presents the following important questions involving the application of this provision and broader issues of retroactive application of federal statutes which have sharply divided the circuits:

1. Whether, as the Third and Eighth Circuits have held, the 1982 amendment to 28 U.S.C. § 1961 applies retroactively to judgments entered prior to its effective date, or whether it should be applied only to judgments entered after its effective date, as the Second, Fourth, Fifth and Seventh Circuits have held?

2. Whether the Court below erred in using the "*Bradley* presumption" in favor of retroactively applying current law to a pending case, notwithstanding controlling authorities of this Court, recently reaffirmed in *Georgetown University Hosp. v. Bowen*, 109 S. Ct. 468 (Dec. 12, 1988), holding that an unqualified, contrary presumption exists that legislation applies prospectively only in the absence of clear and unequivocal statutory language or legislative history to the contrary?

3. Whether 28 U.S.C. § 1961, which provides that interest shall be calculated from the "date of entry of the *judgment*", may be construed to require the calculation of interest from the date of *verdict*?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

This statement is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court. Until it was merged into Petitioner Kaiser Aluminum & Chemical Corporation, Petitioner Kaiser Aluminum & Chemical Sales, Inc., was a wholly-owned subsidiary of Petitioner, Kaiser Aluminum & Chemical Corporation. As of March 27, 1989, Kaiser Aluminum & Chemical Corporation had the following parent companies:

Kaiser Aluminum & Chemical Corporation
Owned by: KaiserTech Limited [44,898,914 shares]
Brown Brothers Harriman, Inc. [406 shares]

KaiserTech Limited
Owned by KLU Holdings, Inc.

KLU Holdings, Inc.
Owned by MPI Investments, Inc.

MPI Investments, Inc.
Owned by MAXXAM Properties Inc.

MAXXAM Properties Inc.
Owned by MAXXAM Group Inc.

MAXXAM Group Inc.
Owned by MAXXAM Inc.

As of March 27, 1989, Kaiser Aluminum & Chemical Corporation had the following subsidiaries (excluding wholly-owned subsidiaries):

DOMESTIC
Alpart Farms (Jamaica) Ltd.
Alpart Jamaica Inc.
Alumina Partners of Jamaica
Filtrol Corporation
Jamaica Alumina Security Company, Ltd.
Kaiser Center Properties

Kaiser Center Properties, Inc.
Kaiser Delaware, Inc.
Oakland City Center Hotel Company, Inc.
Queensland Alumina Security Corporation
Second Queensland Alumina Security Corporation

FOREIGN
Aluminium Bahrain
Aluminium Products Company Limited
Anglesey Aluminium Limited
Boyne Smelters Limited
Hopewell International Insurance Ltd.
Kaiser Jamaica Bauxite Company
Queensland Alumina Finance N.V.
Queensland Alumina Holdings N.V.
Queensland Alumina Limited
Societe D'Etudes des Bauxites du Cameroun
Thai Metal Works Company, Ltd.
Tortuga Casualty Company
United Insurance Company
Volta Aluminium Company Limited

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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, JR.
and BARBARA K. CLISBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser"), pray that a writ of certiorari issue to review the Opinion and Judgment of the Court of Appeals for the Third Circuit rendered on January 9, 1989, awarding respondents postjudgment interest on the judgment obtained in this private antitrust case.

Despite Congress' intent to establish uniformity, the courts of appeals currently award postjudgment interest according to widely divergent standards. The decision of the Third Circuit in this case contributes to the lack of consistency in this area. First, the holding of the Court below that the 1982 amendment to the federal postjudgment interest statute, 28 U.S.C. § 1961, applies retroactively to judgments entered prior to the statute's effective date sharpens the direct conflict among the circuit courts of appeals on this issue. The Court's decision,

which was based on application of a "presumption" in favor of retroactivity, is also illustrative of an even more fundamental confusion among lower courts concerning whether retroactivity is *ever* appropriate in the absence of clear and unequivocal statutory language or legislative history. In addition, the decision of the Court below that postjudgment interest must be calculated from the date of a jury damage *verdict,* rather than from the date of *judgment,* intensifies the conflict among the circuits on the issue of the date from which interest should be calculated.

Review of the decision of the Third Circuit is plainly warranted, as the present multiplicity of approaches among the courts of appeals on the calculation of postjudgment interest frustrates and impedes Congress' intent to establish uniformity in this area. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21.

OPINIONS BELOW

The Judgment of the Court of Appeals is set out in the Appendix to this Petition at A-1.[1] The Opinion of the Court of Appeals, dated January 9, 1989, is reported at 865 F.2d 566 (3d Cir. 1989), and is set out in the Appendix to this Petition at A-3. The Order of the Court of Appeals denying rehearing and rehearing *in banc,* dated February 13, 1989, is set out in the Appendix to this Petition at A-29. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), dated April 11, 1988, is set out in the Appendix to this Petition at A-31.

JURISDICTION

The judgment of the Court of Appeals awarding postjudgment interest was entered January 9, 1989.

1. References to the Appendix are cited herein as "A-——".

A-1. Kaiser's timely petition for rehearing and suggestion of rehearing *in banc* was denied by Order dated February 13, 1989, with a notation that Circuit Judges Becker, Stapleton and Hutchinson would have granted the petition for rehearing *in banc.* A-29-30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition is timely under 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court.

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1961 as it read prior to October 1, 1982 and amended 28 U.S.C. § 1961, which was enacted on April 2, 1982 and became effective on October 1, 1982.

Prior to its amendment in 1982, 28 U.S.C. § 1961 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

As amended in 1982, Section 1961 now provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by

the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

A. Prior Trials And Prior Appeals On The Merits

Columbia Metal Culvert Co., Inc. filed its Complaint in this case in 1974, charging Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser") with violations of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1 and 2, Section 3 of the Clayton Act, 15 U.S.C. § 14, and Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a), as amended by the Robinson-Patman Act. The district court had subject matter jurisdiction over the substantive claim below pursuant to 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331, 1337. Joseph A. Bonjorno, George M. Kerr, Jr., and Barbara K. Clisby ("respondents") were later substituted as plaintiffs when Columbia Metal Culvert Co., Inc. ceased operations.

Respondents tried their claims to a jury beginning in April, 1977. At the conclusion of respondents' case, the district court granted motions for a directed verdict in Kaiser's favor on all counts of the Complaint and entered judgment accordingly. The Court of Appeals reversed and remanded the case for trial. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir. 1978), *cert. denied,* 439 U.S. 876 (1978). The case was tried on remand in July, 1979 before the district court and a jury. On August 16, 1979, the jury returned a verdict for respondents on liability. A

few days later, the same jury awarded damages in the amount of $1,815,000.00. The district court trebled the verdict, and on August 22, 1979 entered a judgment in the amount of $5,445,000.00. Nearly two years later, the district court, by Memorandum and Order dated June 18, 1981, granted Kaiser's judgment n.o.v. motion, in part, with respect to a portion of the respondents' damage claim. In addition, the district court granted Kaiser's motion for a new trial, but only as to damages. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102 (E.D. Pa. 1981).

The new trial, limited to the issue of damages, was held in 1981. The jury returned a single damage verdict of $3,189,313.00 on December 2, 1981 and, two days later, the district court entered judgment in the trebled amount of $9,567,939 on December 4, 1981. One year later, on January 17, 1983, the court granted Kaiser's motion for judgment n.o.v. as to a part of the damage award, vacated the December 4, 1981 judgment and entered judgment on January 18, 1983, in the trebled damage amount of $4,651,560. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983).

Respondents appealed from the part of the judgment granting defendants' motion for judgment n.o.v. on damages and Kaiser cross-appealed the liability issues. By Opinion dated December 27, 1984, the Court of Appeals for the Third Circuit reversed the district court's partial grant of judgment n.o.v., affirmed liability and ordered that the January 18, 1983 judgment be vacated and the December 4, 1981 judgment in the amount of $9,567,939 be reinstated. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied,* 477 U.S. 908 (1986).

On July 1, 1986, the district court entered judgment on remand and on July 3, 1986, Kaiser paid the judgment.

B. The Decision Of The District Court Concerning Post-judgment Interest.

On April 11, 1988, the district court awarded $2,632,886.30 in postjudgment interest to respondents. Applying the standard set forth by this Court in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974), the district court declined to apply the 1982 amendment to 28 U.S.C. § 1961 retroactively to a judgment entered prior to its effective date and, instead, applied that statute as it was in effect on December 2, 1981.

In addition, the district court rejected both parties' positions with respect to the date from which postjudgment interest should run, holding that interest ran from December 2, 1981, the date of the damage *verdict* underlying the December 4, 1981 judgment.

C. The Decision Of The Court Below Concerning Post-judgment Interest.

On the question of retroactivity, a divided panel of the Court of Appeals, in an Opinion authored by Circuit Judge Cowen, applying *Bradley,* reversed the district court's holding that the language of amended § 1961 and its legislative history indicated that it should apply only to judgments entered after its effective date. The Court of Appeals also reversed the finding of the district court that retroactive application of amended § 1961 would result in manifest injustice to Kaiser. The Court of Appeals focused on respondents' rights, rather than on Kaiser's rights, stating that respondents' "right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits." A-22.

Circuit Judge Stapleton dissented, explaining that he would confine the application of amended § 1961 to judgments entered after its effective date, relying on *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984). Judge Stapleton found significant evidence that Congress did not intend the amendment to be applied to judgments entered before its effective date. He said: "Given this focus on the date of the entry of judgment, I think it highly unlikely that Congress intended the post-judgment interest rate in a particular case to be retroactively altered in the event an appeal lasted beyond the effective date of the amendment." A-27. Additionally, from the fact that Congress postponed for six months the effectiveness of this statute, Judge Stapleton deduced that "Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates." A-27.

The Court affirmed the portion of the district court's decision which held that postjudgment interest should be calculated from the December 2, 1981 damage *verdict,* rather than from the date of *"judgment",* as the statute provides. Notwithstanding the fact that the "delay" between verdict and judgment was only two days, the Court held that the district court "correctly revised its decision to conform with *Poleto,* 826 F.2d at 1280, stating that interest is calculated from the date of the damage verdict underlying the appropriate judgment." A-14. The effect of this holding is to read the word "judgment" completely out of the statute and to *require* interest in all cases to run from the date of a damage verdict rather than entry of judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SETTLE A CRITICAL QUESTION OF STATUTORY CONSTRUCTION OF 28 U.S.C. § 1961, ON WHICH THE CIRCUITS ARE IN CONFLICT, DEALING WITH CALCULATION OF INTEREST ON JUDGMENTS.

Prior to 1982, 28 U.S.C. § 1961, the statute which governed the calculation of postjudgment interest on judgments recovered in federal district courts, provided in relevant part that:

> interest shall be calculated from the date of the entry of the judgment, *at the rate allowed by State law.*

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982, which amended § 1961. Pub. L. No. 97-164, § 302, 96 Stat. 25, 55-56 (1982). One of Congress' goals in enacting the statute was to promote national "uniformity" in the calculation of postjudgment interest in federal court. The amendment, which Congress specifically provided *would not take effect* until October 1, 1982, changed the federal postjudgment interest rate to a uniform rate "equal to the coupon issue yield equivalent (as determined by the Secretary of Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment" (hereinafter the "T-bill rate").

The statute does not explicitly state whether the new method for calculating interest applies to judgments entered prior to its effective date.

A. The Court Of Appeals' Analysis Conflicts With This Court's Decision In *Bradley* And Conflicts With The Law Of Other Circuits.

The majority of the panel in the Court below, purporting to apply the analysis prescribed by this Court

in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), held that the amended version of § 1961 applied to the calculation of interest on judgments entered prior to the statute's effective date.

In *Bradley*, this Court relied "on the principle that a court is to apply the law in effect at the time it renders its decision", unless doing so would (1) result in manifest injustice; or (2) there is statutory direction to the contrary; or (3) there is legislative history to the contrary. 416 U.S. at 711.

The Third Circuit's holding that the *Bradley* standard justifies retroactive application of amended § 1961 directly conflicts with the decisions of the Second, Fourth, Fifth and Seventh Circuits, all of which have held that the amendments to §1961 should apply *prospectively only*, i.e., to judgments entered *after* its effective date. *See Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985) (concluding that legislative history and statutory language indicated nonretroactive effect and finding that the opposite conclusion would adversely affect the reliance interests of the litigants); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984) (holding that all three *Bradley* exceptions applied); *United States v. Dollar Rent A Car Svs.*, 712 F.2d 938, 940 (4th Cir. 1983) (holding that amendment did not apply to judgments entered prior to its effective date because there was "no indication that the statute was intended to have retroactive effect"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943 (7th Cir. 1984). Both the Fifth Circuit in *Brooks* and the Second Circuit in *Litton* followed the *Bradley* analysis in reaching that conclusion.

The Third Circuit's holding also conflicts with the approach taken by divided panels of the Sixth and Ninth Circuits, which apply the rate prescribed by the pre-amendment version of §1961 to interest accruing prior to the effective date of the amendment and the T-bill rate, calculated as of the date of the pre-amendment

judgment, thereafter. *See Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987); *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir. 1988), *cert. denied,* 108 S. Ct. 2831 (1988) (White, J.) (dissenting from denial of certiorari). The majority decisions in *Bailey* and *Campbell* were accompanied by vigorous dissents. As in this case, the dissenting judges would have applied amended §1961 only to judgments entered *after* its effective date. *Campbell*, 809 F.2d at 577-79; *Bailey* 838 F.2d at 156-57.

Only the Eighth Circuit has adopted the approach taken by the Third Circuit in this case. *See R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983).[2]

A review of the reasoning in these circuit court opinions dramatically illustrates the extent of the confusion and uncertainty relating to calculation of postjudgment interest under §1961. The Third Circuit in this case addressed each of the three *Bradley* exceptions, and held that *not one* exception applied. On virtually identical facts, the Second Circuit in *Litton,* also a private antitrust case, found that *all three* exceptions applied.

Specifically, the Second Circuit found that the language of the amended statute, which ties the applicable T-bill rate to the date of entry of the judgment, indicates that it should not apply to judgments entered before its effective date. *See Litton*, 746 F.2d at 174.[3] The Court below followed the Ninth Circuit majority in *Campbell*,

2. The Court below noted the conflict among the circuits, stating: "The various courts of appeals have disagreed over whether to apply the federal method of determining interest to judgments entered before October 1, 1982." A-15.

3. This opinion was shared by the Fifth Circuit and the dissenting circuit judges in the Third, Ninth and Sixth Circuits. *Brooks*, 757 F.2d at 742; *Campbell*, 809 F.2d at 578 (dissenting opinion of Wiggins, J.); *Bailey*, 838 F.2d at 156-57 (dissenting opinion of Krupansky, J.); *Bonjorno*, A-27.

which found that the language of the statute "does not shed any light" on the issue. 809 F.2d at 572.

With respect to legislative intent, the Fifth Circuit and the Ninth Circuit, and the dissenting circuit judges in the Third and Sixth Circuits all found an indication of nonretroactivity from the fact that Congress postponed the effective date of the statute. *See Campbell*, 809 F.2d at 573-74; *Brooks*, 757 F.2d at 742; *Bailey*, 838 F.2d at 156; *Bonjorno*, A-26-27. *See also Carl Marks & Co., Inc. v. USSR*, 665 F. Supp. 323, 336 (S.D.N.Y. 1987). The majority of the Court below in this case came to the opposite conclusion, finding Congress' deliberate postponement of the effective date too "ambiguous" to warrant displacing the *Bradley* presumption. *See* A-19.

Finally, the circuits which have addressed "manifest injustice" in this context are sharply divided on what a litigant must establish to fit within this exception. *Bradley* set forth three elements to evaluate whether manifest injustice would result from retroactive application of a statute: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change of the law upon those rights. 416 U.S. at 717.

With respect to the first element, the nature and identity of the parties, this Court's decisions in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and *Bradley* hold that when a case involves private parties, or the case does not involve issues of "great national concern", manifest injustice is more likely and retroactive effect should be rejected. *Schooner Peggy*, 5 U.S. (1 Cranch) at 110; *Bradley*, 416 U.S. at 718-19. In *Litton* and in this case, the plaintiffs argued that because they were acting as "private attorneys general" in enforcing the antitrust laws, their claim for postjudgment interest involved an issue of "great national concern" and could not be considered simply a lawsuit between private parties. The Second Circuit in

Litton rejected this argument, holding that "[w]hatever consideration is appropriate for antitrust plaintiffs as private attorneys general bringing suits that serve the national interest, there is little doubt that national interests are not affected by the outcome of this collateral action to secure an increase in the rate of post-judgment interest." 746 F.2d at 175.

The Third Circuit in this case held *precisely the opposite*, that, because a civil antitrust plaintiff assumes the role of a private attorney general, "an action to increase the rate at which postjudgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interest." A-22.

The Third Circuit's approach to the question of the nature of the rights involved and the impact of the change in §1961 on those rights conflicts with that of the Second and Fifth Circuits, as well. The Second Circuit in *Litton* and the Fifth Circuit in *Brooks* held that application of the new interest rate to a judgment entered prior to its effective date would affect the defendant's right to rely on interest running at the state law rate. *Brooks*, 757 F.2d at 743; *Litton*, 746 F.2d at 175-76. The Third Circuit here, faced with identical facts, held that until a final appellate judgment on the merits, no "mature and unconditional" rights exist and, accordingly, no manifest injustice can occur. A-22.

The inconsistency among the circuit courts of appeals is compounded by the fact that the Administrative Office of the United States Courts, the body charged by Congress with the responsibility for administering §1961, has also taken a position on this question. In a July 27, 1988 Memorandum To All Federal Judges, Magistrates, Court Executives, and Court Clerks, the Administrative Office adopted the position that the 1982 amendment to § 1961 *should not be applied retroactively*, stating:

> It is our view that the new rate will apply only to judgments entered on or after [the effective date]. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

A-57.

The conflict among the circuit courts concerning whether amended §1961 applies to the calculation of interest on judgments entered prior to October 1, 1982 has serious implications nationwide. In the United States District Court for the Eastern District of Pennsylvania *alone*, there are approximately 6110 judgments dated prior to October 1, 1982, which have not been marked "satisfied." Those judgments, totalling approximately $482,758,000, will all potentially be affected by the decision of the Court below.[4] According to the most recent Annual Report of the Administrative Office of the United States Courts, the caseload of the Eastern District of Pennsylvania represents only 3.4 percent of the total caseload in all district courts in the United States. Obviously, therefore, tens of thousands of unsatisfied judgments remain in the districts throughout the nation from prior to October 1, 1982, each potentially affected by resolution of the retroactivity question by this Court. Moreover, the issue is ripe for determination by this Court now that eight of the circuit courts have already grappled with the question and have reached sharply contrasting results.

This court should grant certiorari to resolve the serious conflict among the circuits regarding the applicable rate of postjudgment interest on judgments entered prior to October 1, 1982.

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4. Prior to the decision of the Court of Appeals in this case, it was the understanding of the Clerk of the District Court for the Eastern District of Pennsylvania that the T-bill rates prescribed in amended § 1961 only applied to *judgments entered after October 1, 1982. See* Table of T-bill rates maintained by the clerk of the United States District Court for The Eastern District of Pennsylvania. A-59.

B. The Court of Appeals Applied the Incorrect Presumption That Legislation Should Apply Retroactively to a Case Before it.

The conflict in the circuit courts is symptomatic of a more fundamental split of authority regarding retroactive construction of legislation that goes beyond this particular postjudgment interest statute. The law of presumptions for and against retroactive application of federal statutes is in chaos and the most recent pronouncement from this Court indicates that the "*Bradley* presumption" is no longer viable and should not have been followed by the Court below. *See Georgetown University Hosp. v. Bowen*, 109 S. Ct. 468 (1988).

In this case, the Third Circuit chose to rely on the "*Bradley* presumption", which it defined as a presumption in favor of applying the "law in effect at the time [a court] renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." A-16. The court noted, however, that, "at first glance", the *Bradley* presumption "seems inconsistent" with the "long-standing rule of statutory construction that statutes are presumed to have only 'prospective' effect and will be given 'retroactive' effect only if there is affirmative legislative direction to do so." A-17. In noting the inconsistency in this Court's decisions, the Court below was correct.

1. The Decisions Of This Court Are Not Clear.

The "*Bradley*" presumption and the presumption *against* retroactive application of statutes, as enunciated by this Court, present more than a "seeming inconsistency". The Court's decisions appear to be in serious conflict.

The bias *against* retroactive laws "is an ancient one", dating back to the time of the Greek city-states. *See* Smead, *The Rule Against Retroactive Legislation: A*

Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776 (1936) (cited with approval in Justice Scalia's concurrence in *Georgetown University Hosp. v. Bowen*, 109 S Ct. 468, 479 (1988)). Indeed, in *United States v. Heth,* 7 U.S. (3 Cranch) 399, 413 (1806), this Court held that:

> Words in a statute ought not to have retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the preexisting situation of the parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms and the manifest intention of the legislature.

This Court has frequently, and *recently,* referred to this rule as the "first rule of construction." *See, e.g., United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See Georgetown University Hosp. v. Bowen*, 109 S. Ct. 468 (1988); *Miller v. United States*, 294 U.S. 435, 439 (1935); *Shwab v. Doyle*, 258 U.S. 529 (1922); *United States v. American Sugar Refining Co.*, 202 U.S. 563, 577 (1906). Moreover, since its inception, this rule appeared as an absolute – applicable regardless of whether the law was passed before a case arose or during the time a case was pending. *See Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928).[5] *See also* Freeman, *Inappropriate and Uncon-*

5. In both *Magnolia* and *Greene*, the rule against retroactivity was applied when the law changed during the pendency of the case.

stitutional Retroactive Application of Superfund Liability, 42 Bus. Law. 215, 217-18 (1986).

Simultaneously, the Court has articulated a contradictory rule of statutory construction. In *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Court said that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, *the law must be obeyed*. . . ." *Id.* at 110. (Emphasis added).

In *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), this Court, without mentioning the conflicting rule of construction, adopted the *Schooner Peggy* approach to a statutory change during the pendency of an appeal. The Court's only reference to the conflicting decisions was in a footnote where, without explanation, it characterized *Greene v. United States*, 376 U.S. 149 (1964), as an "exception" to the *Schooner Peggy* presumption for cases in which its operation would work "manifest injustice". 393 U.S. at 282 n.43.

The Court followed *Thorpe* in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), again adhering to *Schooner Peggy*. The Court appeared definitively to reject the presumption that statutes apply only prospectively, at least in the context of a pending case, stating, "we must reject the contention that a change in the law is to be given effect in a pending case only where that is

NOTES *(Continued)*

In *Greene*, plaintiff sued the government, alleging that his security clearance had been unlawfully revoked. After he had instituted a claim, but before a determination of the appropriate remedy, the regulations governing the procedure for obtaining restitution were changed. This Court held that the new regulations did not apply.

Similarly, in *Magnolia*, the law prescribing the method for calculating interest on a tax refund changed after an IRS "allowance" of plaintiff's refund but prior to calculation of the appropriate amount of interest. This Court held that the new method for calculating interest did not apply retroactively if the "allowance" of the refund fell prior to the change in the law.

the clear and stated intention of the legislature." 416 U.S. at 715. As in *Thorpe*, the Court referred to *Greene* as an "exception" to the general rule, where retrospective application would bring about manifest injustice. 416 U.S. at 717 n.24.

This Court's decisions since *Bradley* on the retroactivity of legislation have fueled the confusion. Although *Bradley* appeared to settle the question with respect to changes in law during a case pending upon direct review, *only once* has this Court invoked the "*Bradley* presumption" to construe a rule of law retrospectively. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (Powell, J.). The rule at issue in that case, however, was established by *judicial decision* rather than by statute. The Court has consistently distinguished between the appropriate retroactivity analysis in these two contexts. *See, e.g., United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student").

By contrast, on three occasions, this Court has refused to permit retroactive application of a newly-enacted law to a pending case. In *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985), the Court, in an Opinion authored by Justice O'Conner, found it unnecessary to reconcile *Bradley* with the presumption against retroactive application because the case fell into the exception to the *Bradley* rule.

In two other recent decisions, however, this Court has chosen to adhere to the presumption that statutes operate prospectively only, without so much as mentioning *Bradley,* or the existence of the opposite presumption. *See Georgetown University Hosp. v. Bowen,* 109 S. Ct. 468 (1988); *United States v. Security Indust. Bank,* 459 U.S. 70, 79 (1982).

In *Security Indust. Bank,* in an Opinion by Chief Justice Rehnquist, the Court explained that the " 'first

rule of construction is that legislation must be considered as addressed to the future, not to the past.' " 459 U.S. at 79 (citing *Union Pacific R.Co. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913)). The Court further noted that " '[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought *never* to receive such a construction if it is susceptible of any other.' " 459 U.S. at 79-80 (emphasis added) (citing *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.,* 209 U.S. 306, 314 (1908)).[6]

Most recently, in an Opinion authored by Justice Kennedy and issued on December 12, 1988, after oral argument in this case, this Court held without exception and without qualification that *"congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."* *Georgetown University Hosp. v. Bowen,* 109 S. Ct. 468, 471 (1988) (emphasis added). The Court emphasized that *"[r]etroactivity is not favored in the law." Id.* (emphasis added).[7]

Georgetown is most significant because it cited *Greene* and *Magnolia* as primary support for the general presumption against retroactivity. In both *Greene* and *Magnolia,* the Court refused to apply a newly-enacted law *to a pending case,* relying on the presumption that legislative enactments should be applied only prospectively. In light of its implicit rejection of *Bradley* in *Georgetown,* this Court should grant certiorari to review the choice of the *Bradley* presumption by the Third

6. Ironically, Chief Justice Rehnquist cited *Schooner Peggy* as *support* for the prospective-only presumption. *Id.*

7. Justice Scalia, in his concurring opinion, likewise explained that "[r]etroactive legislation has always been looked upon with disfavor . . . and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation." *Id.* at 479 (citing Smead, *The Rule Against Retroactive Legislation: A Basic Principle Of Jurisprudence,* 20 Minn. L. Rev. 775 (1936)).

Circuit. In the alternative, it should remand the case to the Third Circuit for reconsideration in light of *Georgetown.*

2. The Conflicting Signals In This Court's Prior Decisions On Retroactivity Have Led To Conflicting Interpretations By Lower Courts.

The conflicting signals in this Court's decisions have seriously confused the lower courts and the decisions of the Circuits are a morass on this important issue.

This case is a perfect example. The Third Circuit provided only two reasons for choosing the *Bradley* presumption over the conflicting presumption that statutes apply prospectively only.[8] First, it stated that the presumption against retroactivity applies "only when application of the new law would affect rights or obligations existing prior to the change in law." A-17. Second, citing *United States v. Security Industrial Bank,* 459 U.S. 70, 78 (1982), the court below stated that it applied the *Bradley* presumption "because to do so does not pose any constitutional problems." A-17.

Other courts have disagreed. The Fifth Circuit in *Griffon v. United States Dept. of Health and Human Services,* 802 F.2d 146, 153-55 (5th Cir. 1986) (relying on *Turner v. United States,* 410 F.2d 837 (5th Cir. 1969)), for example, identified a hard and fast rule in this Court's precedents that changes in substantive rules of law apply prospectively only, while changes in procedure or remedy are "usually held immediately applicable to pending cases, including those on appeal from a lower court." Id. at 154. *Accord Yakima Valley Cablevision, Inc. v. F.C.C.,* 794 F.2d 737, 748 (D.C. Cir.

8. The Third Circuit's opinion tracked the opinion of the Ninth Circuit in *Campbell v. United States,* 809 F.2d 563 (9th Cir. 1987).

1986); *United States v. Oakwood Downriver Medical Center,* 687 F. Supp. 302, 306 (E.D. Mich. 1988).

The Second Circuit has attempted to harmonize the two canons by simply holding that there exists "a presumption in favor of retroactivity as to judgments pending on direct review, contrary to the normal presumption against retroactivity in other circumstances." *Litton,* 746 F.2d at 174.

The Court of Appeals for the Seventh Circuit has arrived at yet a different rule in attempting to harmonize the apparently conflicting rules in this Court's decisions. The court held in *United States v. Kairys,* 782 F.2d 1374, 1381 (7th Cir. 1986), *cert. denied,* 476 U.S. 1153 (1986), that "[l]egislative enactments are presumed to be prospective absent clear statements by Congress to the contrary". The court cited *Bradley* to *strengthen,* rather than to contradict this canon of construction, for the proposition that "[t]his rule is even more appropriate when the statute affects vested rights." *Id. Accord Allied Corp. v. Acme Solvents Reclaiming, Inc.,* 691 F. Supp. 1100, 1110 (N.D. Ill. 1988) (following *Kairys* which it found to be a "combin[ation of] the *Security Indust. Bank* and *Bradley* approaches. . ."). *See also Ohse v. Hughes,* 816 F.2d 1144, 1148 n.3 (7th Cir. 1987) (applying a presumption *against* retroactivity in case where new law enacted during pendency of an appeal); *Merit Ins. Co. v. Leatherby Ins. Co.,* 728 F.2d 943, 945 (7th Cir. 1984) (holding amended §1961 not retroactive to pending case).

The Eighth Circuit has explicitly called attention to the conflict in this Court's decisions. In *Iowa Power & Light Co. v. Burlington Northern, Inc.,* 647 F.2d 796, 805 n.13 (8th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), it acknowledged that the *Bradley* rule "conflicts with the rule of statutory interpretation favoring prospective application of a new law." The Eighth Circuit pointed out that the "conflict between these principles has not often been acknowledged, let alone resolved."

The court in that case, however, found it "unnecessary to resolve the conflict between the two lines of decision because [it reached] the same result under the concept of presumed prospectivity and under the 'manifest injustice' exception to the rule applying new law to pending cases." *Id.*

The Court of Appeals for the District of Columbia Circuit has simply held that it "should struggle hard . . . to construe a statute silent as to retroactivity in a manner so as not to create a retrospective obligation." *Ralis v. RFE/RL, Inc.,* 770 F.2d 1121, 1127 (D.C. Cir. 1985). The court held that the presumption that statutes operate only prospectively coincides with the "manifest injustice" prong of the *Bradley* analysis.

Finally, some courts, apparently unable to resolve the confusion, have applied one or the other presumption without referring to *any* contrary authority. The Court of Appeals for the Fourth Circuit chose the *Bradley* approach in this way. *See Coe v. Sec. Health & Human Servs.,* 502 F.2d 1337 (4th Cir. 1974). By contrast, the Eleventh Circuit has relied on the presumption that statutes apply prospectively only without mentioning *Bradley. See Fordham v. Belcher Towing Co.,* 710 F.2d 709, 710 (11th Cir. 1983) (statute of limitations); *accord United States v. Moore,* 698 F. Supp. 622, 625 (E.D. Va. 1988).

The First, Sixth and Ninth Circuits, in opinions authored by different circuit judges, have followed *both routes. See United States v. Anguilo,* 755 F.2d 969, 970-74 (1st Cir. 1985); *Bailey v. Chattem, Inc.,* 838 F.2d 149, 155-156 (6th Cir. 1988), *cert. denied,* 108 S. Ct. 2831 (1988); *Campbell v. United States,* 809 F.2d 563, 569-77 (9th Cir. 1987). In these cases, the panels from these circuits followed *Bradley* without mentioning contrary authority. In *Dion v. Secretary of Health & Human Servs.,* 823 F.2d 669, 671-72 (1st Cir. 1987), *Watson v. Secretary of Health, Educ. & Welfare,* 562

F.2d 386, 389-90 (6th Cir. 1977) (attorneys fees statute), and *United States v. Rewald,* 835 F.2d 215, 216 (9th Cir. 1987), different panels from these circuits applied the presumption in favor of prospective application of statutes to a pending case without mentioning *Bradley*.

The confusion on this important question reflects the conflicting signals from this Court and certiorari should be granted to resolve the issue.

II. THE THIRD CIRCUIT ERRED IN RULING THAT INTEREST BEGAN TO ACCRUE ON THE DATE OF VERDICT WHEN THE PLAIN LANGUAGE OF THE STATUTE PROVIDES THAT INTEREST SHALL RUN FROM THE DATE OF "JUDGMENT".

Section 1961 provides that interest "shall be calculated *from the date of the entry of the judgment* . . . ." 28 U.S.C. §1961. Ignoring the clear statutory term "judgment", both the district court and the Court of Appeals in this case held that interest should run from the date of the jury's verdict on damages. The difference can be crucial in cases where there is a delay between the date of the verdict and the date of entry of judgment. This case, again, is a prime example. Here, although only two days intervened between entry of a *judgment* and the date of the *verdict,* the difference could amount to *millions* of dollars.[9] In addition, the Court below rejected

9. After the decision in the Court of Appeals, respondents raised an issue concerning the construction of §1961 which, if respondents' position prevails, makes this two-day delay critical. According to respondents, the November 25, 1981 T-bill auction, which pursuant to amended §1961 would set the appropriate interest rate did not "settle" until December 3, 1981. Respondents argue that the "settlement" date, not the auction date, changes the applicable postjudgment interest rate. The damage verdict in this case was returned on December 2, 1981 and judgment was entered upon it on December 4. Respondents' present position is that the interest rate changed from 14.84 percent to 11.58 percent on

Kaiser's position that interest should not be calculated from the December 4, 1981 vacated judgment of the district court, but rather should run from the date of remand to the district court, after the exhaustion of all appeals.

The approach adopted by the Third Circuit appears to *mandate* the running of interest from the date of a damage verdict in all cases, *even when there is no inordinate delay between the date of the verdict and the date of entry of judgment.* No other court of appeals has so held. Moreover, quite apart from the rule laid down by the Court below, the decision aggravates an existing conflict among the circuits with respect to the appropriate date from which to calculate interest.

The commentators have noted this split. One authority recently noted that the "courts of appeals have reached . . . *differing conclusions without providing guidance or a consistent set of rules as to the circumstances that govern their decisions.*" *See* Comment, *Postjudgment Interest In Federal Court,* 37 Emory L. J. 495, 498 (1988). (Emphasis added).

Five circuits allow an "equitable construction" of §1961, which permits, but does not require, postjudgment interest measured from the date of the ascertainment of damages, whether by verdict or by an erroneous judgment, even though final judgment is delayed to

December 3, 1981. *This makes the two-day delay between date of the verdict and date of entry of judgment potentially a $4 million question of statutory construction, increasing the interest award from approximately $8.5 million to over $12 million.*

Kaiser disputes respondents' argument on this issue. The Administrative Office of the United States Courts, which is responsible for informing federal judges of the change in the §1961 rates, has considered the question and has concluded that the auction date is the appropriate date on which to change the postjudgment interest rate. A-66 The Court of Appeals declined to rule on this aspect of respondents' construction of the statute and has remanded that issue to the district court for consideration in the first instance. A-74.

some later date. *See, e.g., United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971); *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472-73 (2d Cir. 1988); *Bailey v. Chattem, Inc.*, 838 F.2d 149, 153-55 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983).

The Fifth and Seventh Circuits, on the other hand, have "equitably construed" §1961, but only to allow interest to be calculated from the date of remand to the district court after the exhaustion of all appeals. *See Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986); *Brown & Williamson Tobacco Corp. v. Jacobson*, Nos. 86-2474, 86-2475, Slip. op. (7th Cir. Nov. 6, 1987).[10]

The Tenth Circuit, which also allows an "equitable construction", has adopted still another approach. In the Tenth Circuit, postjudgment interest runs from the date of an original erroneous judgment when a later judgment has been entered, but only if the later appellate reversal "was not on any basic liability errors or errors in procedure which affected the basic issues but only on a dollar value, a matter of degree." *Federal Deposit Ins. Corp. v. Rocket Oil Co.*, 865 F.2d 1158, 1161 (10th Cir. 1989). *See also Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 7 (1988); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

The District of Columbia Circuit follows the explicit language of §1961. Postjudgment interest accrues in that circuit only from "the date on which the district court entered a final judgment under rule 54(b)." *Hooks*

10. Kaiser has consistently maintained that here, as in *Affiliated Capital*, interest should run from July 1, 1986, the date of remand from this Court.

v. Washington Sheraton Corp., 642 F.2d 614, 616-18 (D.C. Cir. 1980) In *Hooks*, the court rejected the plaintiff's argument that interest should be calculated as of the date of the jury damage verdict.

This Court has consistently held that, in the "absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *Burlington Northern R. Co. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597 (1986)). "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

Section 1961 could not be more explicit: "interest shall be calculated from *the date of the entry of the judgment* . . . ." Fed. R. Civ. P. 58 explains what is required of the district court in order to enter judgment, and explicitly distinguishes between a jury verdict and the subsequent entry of judgment. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958) (defining "entry of judgment"). The date chosen by the Court below to begin the accrual of interest was not the date judgment was entered and the Court's holding should be reviewed and reversed by this Court.

This Court should grant certiorari in this case to resolve this conflict among the circuits as to the date on which postjudgment interest begins to accrue pursuant to §1961 when either (1) judgment is not entered on the same day as the jury returns a damage verdict; or (2) the judgment of the district court is reversed or modified on appeal.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., *Appellants* No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., *Appellants* No. 88-1396

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 74-0122)

Present: STAPLETON, SCIRICA and COWEN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by Counsel October 21, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 12, 1988, be, and the same is hereby affirmed insofar as it determined that post-judgment interest would accrue from December 2, 1981, and reversed insofar as it determined that the applicable rate was Pennsylvania's six percent simple interest rate, and the cause is remanded to the said District Court for recalculation of post-judgment interest under the higher T-bill rate imposed by 28 U.S.C. §1681* (1982). All of the above in accordance with the opinion of this Court.

ATTEST:

Kelly Davis

Clerk

January 9, 1989

*28 U.S.C. §1961 apparently was intended.

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On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 74-0122)

Argued October 21, 1988

Before: STAPLETON, SCIRICA and COWEN, *Circuit Judges*.

(Filed January 9, 1989)

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OPINION OF THE COURT

COWEN, *Circuit Judge*.

This appeal arises from an order of the district court granting plaintiff's motion for post-judgment interest. Upon review, we conclude that the district court erred with respect to some aspects of its application of the relevant statute. We will affirm the district court's determination of the date from which interest runs. We will reverse the district court's grant of post-judgment interest in the amount of $2,632,886.30 because it incorrectly determined that the applicable rate under the post-judgment interest statute is Pennsylvania's six-percent simple interest rate, rather than the higher T-bill rate imposed by 28 U.S.C. § 1961 (1982).

I.

This appeal involves a determination of (1) the applicable rate of post-judgment interest, and (2) the

date from which post-judgment interest should run.[1] Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby ("Bonjorno"), trustees in liquidation and dissolution of Columbia Metal Culvert Co., Inc. ("Columbia"), filed a motion for award of post-judgment interest under 28 U.S.C. § 1961 against defendants Kaiser Aluminum Chemical Corp. and Kaiser Aluminum Chemical Sales, Inc. ("Kaiser").[2] The merits of the underlying case are not relevant for purposes of this appeal.[3] However, a statement of the procedural history of the case is necessary in order to resolve the issues presented.

The complaint in this case was filed in January, 1974. At the first trial, the United States District Court for the Eastern District of Pennsylvania directed a verdict for Kaiser at the conclusion of Bonjorno's

---

1. Normally, there are two components of the total interest amount. The first component is the interest from the date of the loss to the date of the judgment. This element is generally awarded either as prejudgment interest or as a portion of the continuing damages up to the time of the judgment. The second component is the interest from the date of the judgment to the date that the damages are paid. This amount is awarded as post-judgment interest under 28 U.S.C. § 1961 (1982). *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985). The plaintiffs do not seek pre-judgment interest in this appeal.

2. Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby were substituted as plaintiffs when Columbia went out of business.

3. The plaintiffs were the sole stockholders of now defunct Columbia which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. The plaintiffs alleged that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of the Sherman Act, 15 U.S.C. 11 1 & 2 (1982). A statement of plaintiff's claims in the underlying litigation may be found in *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802 (3d Cir. 1984).

evidence. The Court of Appeals for the Third Circuit reversed, holding that there was sufficient evidence to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 37 (3d Cir. 1978).

A second trial held in 1979 resulted in a jury verdict for Bonjorno. On August 21, 1979, the jury awarded Bonjorno damages in the trebled amount of $5,445,000.00 and the judgment was entered on August 22, 1979. Kaiser then filed motions for a new trial and judgment NOV.

On June 17, 1981, the district court denied Kaiser's motions as to the jury's prior liability verdict, but concluded that the evidence did not support the jury's damage award and granted Kaiser's motion for a new trial as to damages only. *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 518 F. Supp. 102, 109, 119 (E.D. Pa. 1981).[4] Additionally, the district court granted Kaiser's motion for judgment NOV as to a portion of the damages previously awarded by the jury in 1979. *Id.* at 114.

The limited retrial on damages was conducted in 1981 and resulted in a December 2, 1981 jury award for Bonjorno for damages in the trebled amount of $9,567,939.00. The judgment was entered on December 4, 1981. Once again, Kaiser filed motions for a new trial and judgment NOV. On January 17, 1983, the district court granted Kaiser's motion for judgment NOV as to a portion of the damages awarded by the jury, thereby reducing the judgment to $4,651,560.00 after trebling. *Bonjorno v. Kaiser Aluminum & Chem.*

4. There is some confusion as to whether this particular order was appealed. The district judge found that "[the Third Circuit Court of Appeals] affirmed the court's grant of a new trial on damages." App. at 772. However, Kaiser's counsel at oral argument claimed that such order was never appealed by the parties and we find this to be a correct statement of the case.

Corp., 559 F. Supp. 922 (E.D. Pa. 1983). This judgment was entered on January 18, 1983.

Bonjorno then appealed the reduction of the damage award, and Kaiser cross-appealed the failure of the district court to grant a new trial or to grant in full its motion for judgment NOV. On December 27, 1984, the Court of Appeals reversed the district court's partial grant of Kaiser's motion for judgment NOV as to damages, vacated the judgment entered on January 18, 1983, and reinstated and affirmed the entire $9,567,939.00 judgment entered on the jury's verdict of December 2, 1981. *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 815 (3d Cir. 1984). Kaiser's petition for rehearing in banc was denied, as was its subsequent petition for certiorari. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 477 U.S. 908 (1986).

Because the Court of Appeals' December 27, 1984 opinion was silent as to the allowance of post-judgment interest, Bonjorno petitioned this Court on June 24, 1985 for instructions to be included in the mandate pursuant to Fed. R. App. P. 37 regarding interest.[5] Before this petition was acted upon by this Court, counsel for both parties entered into a stipulation providing that the district court first address all issues of interest allowable under 28 U.S.C. § 1961 and Fed. R. App. P. 37. This Court approved that stipulation on July 1, 1986 and certified the judgment in lieu of a formal mandate.

On July 1, 1986, the mandate of this Court, which had been stayed pending disposition of Kaiser's

5. Fed. R. App. P. 37 provides in pertinent part:

> If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

petition for a writ of certiorari, was issued to the district court. On July 3, 1986, Kaiser paid $9,567,939.00 to Bonjorno. This Court's certified judgment did not instruct the district court on the issues of post-judgment interest.

After full briefing, the district court heard oral argument on the post-judgment interest issues on December 23, 1986. On April 11, 1988, it issued its Memorandum and Order awarding $2,632,886.30 in post-judgment interest to Bonjorno. App. at 770. The district court held that interest ran from December 2, 1981, the date of the damage verdict on which the correct judgment would have been entered but for the district court's partial grant of judgment NOV.

The district court next addressed the question of whether the amendments to 28 U.S.C. § 1961 apply to money judgments entered prior to October 1, 1982, the effective date of the amendments. Specifically, having determined that the interest should run from December 2, 1981, the district court was faced with the question of whether the higher interest rate imposed by the amended version of 28 U.S.C. § 1961 should apply from December 2, 1981-- ten months before the effective date of the amendments. Interpreting *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), the district court refused to apply the amended statute "retroactively" and, instead, applied the version of the statute which was in effect on the December 2, 1981 jury verdict date. App. at 784.

The federal statute governing awards of post-judgment interest in effect from the time Columbia filed its complaint on December 23, 1974 through December 2, 1981 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of judgment at the rate allowed by State law.

28 U.S.C. § 1961 (1976)(amended 1982).

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982 ("FCIA"), Pub. L. No. 97-164, 96 Stat. 25 (1982) which amended 28 U.S.C. § 1961 (effective October 1, 1982). The amended statute states in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

28 U.S.C. § 1961 (1982).

Thus, the district court's decision applies the six-percent simple interest rate required under

Pennsylvania law, as opposed to the significantly higher "T-bill" rate required by the amended version of 28 U.S.C. § 1961.[6]

The district court also rejected Bonjorno's argument that interest continued to run after Kaiser paid the $9,567,939.00 judgment on July 3, 1986. After a full evidentiary hearing, the court on April 11, 1988 made a factual finding that the parties intended the July 3, 1986 payment as a payment of the principal amount. App. at 792. Bonjorno filed a notice of appeal from the April 11, 1988 Order and Kaiser filed its notice of cross-appeal on May 11, 1988.

II.

We note at the outset of our analysis that the availability of interest in an action arising under a federal statute is governed by federal law, not the law of the forum state. *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987). Because Bonjorno's underlying claims allege violations of the federal antitrust laws, state substantive law is not implicated. *Id.*

We have jurisdiction over this appeal because the judgment of the district court is "final" for purposes of 28 U.S.C. § 1291 (1982). Determining whether the FCIA applies to judgments entered prior to its effective date presents an issue of law, over which we have plenary review. *See, e.g., Campbell v. United States*, 809 F.2d 563, 567 (9th Cir. 1987). The district court's determination that the July 3, 1986 payment was intended to go to principal presents a factual question which we review subject to the clearly erroneous standard.

6. The "T-bill" rate is "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." 28 U.S.C. § 1961 (1982).

A.

THE DATE FROM WHICH INTEREST BEGINS TO RUN

We must first determine the date from which post-judgment interest runs. In this case, the parties have suggested three dates as possible starting points for the accrual of post judgment interest: (1) Kaiser argues that the district court correctly began the accrual of interest on December 2, 1981, the date of the initial jury verdict on damages which was vacated and then reinstated; (2) alternatively, Kaiser argues that interest accrues from July 1, 1986, the date of this Court's mandate; and (3) Bonjorno argues that interest should accrue from August 16, 1979, the date the jury delivered its liability verdict.

First, we reject the third possibility. Bonjorno argues that interest should accrue from the date of the original liability verdict-- August, 1979-- because liability was ultimately affirmed. *See Bonjorno*, 752 F.2d 802. However, the August 16, 1979 verdict on liability alone was insufficient under Fed. R. Civ. P. 54(c) to allow or require the court to enter judgment. Little if any authority supports the position that post-judgment interest accrues from the date of an unliquidated verdict or from a judgment vacated by a district court which is never reinstated, modified or even appealed. The vast majority of cases which construe section 1961 to allow interest to run from a verdict rather than a "judgment" involve verdicts which include an assessment of damages where judgment is later entered on the verdict amount. *See, e.g., Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Givens v. Missouri-Kansas-Texas R.R. Co.*, 196 F.2d 905 (5th Cir. 1952). In *Poleto*, we stated that "the purpose of post-judgment interest is to

compensate the successful plaintiff for being deprived of compensation for the loss from the time between the *ascertainment of the damage* and the payment by the defendant." 826 F.2d at 1280 (emphasis added). This reasoning weighs against permitting Bonjorno to recover interest from August 16, 1979 (the date of the unliquidated liability verdict) or August 22, 1979 (the date of the first damage verdict which was vacated and never reinstated, increased, reduced or even appealed).[7]

We next choose between December 2, 1981 and July 1, 1986 as the proper date to begin the accrual of interest. Kaiser argued in the district court that because its liability for the $9,567,939.00 judgment did not become final until this Court issued its mandate on July 1, 1986, interest should run from this date.

We note that a split among the courts of appeals for several of the circuits exists with respect to the proper application of 28 U.S.C. § 1961, i.e., whether the date of the original award is used if it is later vacated but then reinstated or whether the date of the later award is used.[8] However, the Third Circuit Court of Appeals has previously addressed this issue.

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7. The cases allowing interest to run from a date other than the final judgment date involve situations in which the court either reinstates a verdict or modifies the amount of the judgment. *See, e.g., Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897 (3d Cir. 1985)(modifying a judgment); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984)(holding that plaintiff is entitled only to post-judgment interest from the date of the first judgment to the date of the second judgment because the claim was not liquidated until the first judgment).

8. *See Chattem, Inc. v. Bailey*, ___ U.S. ___, 108 S. Ct. 2831 (1988)(White, J.)(dissenting from denial of certiorari). The Courts of Appeals for the Seventh and Tenth Circuits use the later date for purposes of calculating post-judgment interest under this statute. *See Harris v. Chicago Great W. Ry Co.*, 197 F.2d 829, 836 (7th Cir. 1952); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 366 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). By contrast, the Courts of Appeals for the First, Second, Third, Fifth, Sixth, Eighth and Ninth Circuits have adopted a broader reading of § 1961 and begin the accrual of interest from the date of the initial judgment. *See United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971); *Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280-81 (3d Cir. 1987); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 710 (5th Cir. 1986); *Chattem v. Bailey*, 838 F.2d 149, 153 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2831 (1988); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983). In *Smith*, the Court of Appeals for the Second Circuit recently reversed the position it had earlier taken in *Powers v. New York Cent. R.R.*, 251 F.2d 813, 818 (2d Cir. 1958).

We hold that the interest properly accrues from the December 2, 1981 judgment. *See Institutionalized Juveniles*, 758 F.2d 897, 927 n.48 (3d Cir. 1985) (stating that "[w]e . . . reject the rule articulated in *Harris v. Chicago Great Western Ry.*, 197 F.2d 829, 835 (7th Cir. 1952), which would allow interest only from the date of the revised judgment [i.e., following the Court of Appeal's mandate].").[9]

In *Institutionalized Juveniles*, 758 F.2d at 927, this Court "adopt[ed] the rule set out in" *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973). In addressing the amount of post-judgment interest

9. Kaiser acknowledges in its brief that this Court of Appeals would most likely rule that the earlier date applies; however, it presents the argument for purposes of preserving it for possible appeal to the United States Supreme Court in light of the conflict among circuit courts. Kaiser states that "Kaiser acknowledges, however, that the combined effect of this Court's holding in *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987), and *Institutionalized Juveniles v. Sec. Pub. Wel.*, 758 F.2d 897 (3d Cir. 1985), may foreclose this argument before this Court." Appellee's Brief at 41.

available on a reduced attorney fee award, the court in *Perkins* held that the reduction of the award was a partial affirmance of the district court judgment and that interest would run from the date the district court erroneously awarded the excessive fees. 487 F.2d at 676. The court stated that "interest should run from the date of entry of the original judgment because that is the date on which the correct judgment should have been entered." *Id.*

Had there been no error by the district court in this case, a judgment for damages would have been entered on December 4, 1981, based on the jury verdict returned December 2, 1981. The district court then correctly revised its decision to conform with *Poleto*, 826 F.2d at 1280, stating that interest is calculated from the date of the damage verdict underlying the appropriate judgment. Accordingly, the district court correctly awarded interest from December 2, 1981.[10]

B.

THE APPLICABLE LAW AND RATE OF INTEREST

We next address the issue of which version of the FCIA is to govern the calculation of post-judgment interest.[11] When the December 2, 1981 jury verdict in

10. *See, e.g., Poleto*, 826 F.2d at 1280 (stating that "[t]he purpose of postjudgment interest is not diluted where, as here, the initial ascertainment of damages is left standing but a delay occurs between the date of the ascertainment and the date of the eventual entry of judgment."). In *Poleto*, the verdict and the entry of judgment were separated by approximately three months. We concluded that "[b]ecause all the substantive issues were decided by the jury upon the verdict . . . it is analogous to a final judgment for purposes of section 1961." *Id.*

11. We have considered Bonjorno's argument that a "market rate" of interest should apply; however, we find the argument to be without merit.

this case was rendered, 28 U.S.C. § 1961 applied the relevant state interest rate, which in this case was Pennsylvania's six percent simple interest rate. *See* 28 U.S.C. § 1961 (1976).[12] Effective October 1, 1982, the statute was amended to provide a uniform federal post-judgment interest rate equal to the T-bill rate. *See* 28 U.S.C. § 1961(a)(1982).

The various courts of appeals have disagreed over whether to apply the federal method of determining interest to judgments entered before October 1, 1982. *See, e.g., Bailey v. Chattem, Inc.*, 838 F.2d 149, 156 (6th Cir. 1988)(applying the pre-amendment rate of interest up to the effective date of the amendments and applying the post-amendment rate thereafter); *Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987)(same); *Litton Sys. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984)(holding that the FCIA does not apply to a June 1981 judgment against a private party for interest accruing either after the judgment or after the effective date); *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.)(holding that the amended statute should apply to a pre-effective date judgment for the entire post-judgment period), *cert. denied*, 464 U.S. 1009 (1983). Thus, three interpretations have been presented and approved by the various courts of appeals: (1) the FCIA applies to judgments entered after the effective date; (2) it applies to judgments entered before the effective date for the entire post-judgment period; and (3) it applies to judgments entered before the effective date but only for interest accruing in the period after the effective date.[13] *See Campbell*, 809 F.2d at 568.

12. The post-judgment interest rate in Pennsylvania is calculated at the legal rate which is six percent. 42 Pa. Cons. Stat. Ann. § 8101 (Purdon 1988).

13. The Courts of Appeals for the Second, Fourth, Fifth and Seventh Circuits agree that amended § 1961 should not to be

We find that the issue is whether "to apply the law in effect at the time [a court] renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board*, 416 U.S. 696, 711 (1974). *Bradley*, therefore, provides the starting point for our analysis.

The district court, relying on two cases in the Eastern District of Pennsylvania, found that "courts in this Circuit have uniformly assumed the correctness of the holding herein that the prior version of section 1961 applies to judgments entered while it was in effect and amended section 1961 applies to judgments entered on and after its effective date." App. at 789, *citing United States ex rel. Billows Elec. Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983)(holding that the FCIA does not apply to a July 1981 judgment against a private party for interest accruing after the judgment), *aff'd mem.*, 729 F.2d 1450 (3d Cir. 1984) and *Peterson v. Crown Fin. Corp.*, 553 F. Supp. 114 (E.D. Pa. 1982)(same holding for a July 1979 judgment). While the United States Court for the Eastern District of Pennsylvania has refused to apply the post-amendment rate to judgments pre-dating the effective date of the amendments, its decisions do not bind this Court. We note that neither of these cases cite *Bradley*.[14] Thus, we view this issue as an open question not yet squarely addressed by this Court.

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construed to apply to judgments entered before its effective date, even if on that date they were pending on direct review. *See Brooks v. United States*, 757 F.2d 734, 741 (1985); *Litton*, 746 F.2d at 174; *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 944 (7th Cir. 1984), *cert. denied*, 469 U.S. 918 (1984); *United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983).

14. *Bradley* does not characterize the issue as one of "retroactivity."

At a first glance, the *Bradley* presumption of applying the law in effect at the time a court renders its decision in the absence of contrary legislative intent seems inconsistent with the long-standing rule of statutory construction that statutes are presumed to have only "prospective" effect and will be given "retroactive" effect only if there is affirmative legislative direction to do so. However, upon closer examination, the two principles are not in conflict here.[15] While the term "retroactive" is commonly used to refer to statutes that operate on pre-enactment transactions and pre-existing rights or obligations, a statute is not "retroactive" simply because facts from the pre-enactment period are implicated. The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law. *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). We apply the *Bradley* presumption in this case because to do so does not pose any constitutional problems.

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15. In *Bradley*, Justice Blackmun, writing for a unanimous Court, cautioned that the issue was not whether the fee statute applied "retroactively" to fees for services rendered prior to enactment, but rather whether a fee award was justified by current law. He states:

> The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.

416 U.S. at 710.

1. *Legislative History*

We turn next to the legislative history to determine whether Congress intended that the FCIA not be applied to interest accruing after the effective date on judgments entered prior to that date. We agree with the Courts of Appeals for the Second and Ninth Circuits that this presumption may be displaced by "fair indication that the statute, properly construed, has only prospective effect." *See Litton Systems*, 746 F.2d at 174; *Campbell*, 809 F.2d at 572 (quoting *Litton Systems*, 746 F.2d at 174). However, if the legislative history is unclear, the *Bradley* presumption should control. *See Bradley*, 416 U.S. at 715-16.[16]

Unfortunately, the legislative history concerning the effect of the FCIA's post-judgment interest provision on unpaid judgments entered prior to the date of enactment is sparse. In *Campbell*, the Court of Appeals for the Ninth Circuit stated that it was "not persuaded that this scant indication in the statute and legislative history constitutes a 'fair' indication that the FCIA should not be interpreted to impose interest at the T-bill rate in the period *following* the enactment date." 809 F.2d at 574 (emphasis in original). The "scant indication" was that the effective date of the amendments was delayed for a period after the date of the enactment of the amendments. The district court in this case found persuasive the fact that Congress specifically postponed the effective date of the

16. The Court in *Bradley* did not explicitly hold that a change in the law must be given effect to pending cases unless a clear indication existed to the contrary. Nevertheless, although the Court stated that "neither our decision in *Thorpe* nor our decision today purports to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary," *id.*, it did apply the *Bradley* presumption of retroactivity in the face of the "equivocal" legislative history of the statute at issue in the case, *id.* at 716-17.

amendments for six months from passage on April 2, 1982 until October 1, 1982. App. at 787-88, *citing* Pub. L. No. 97-164, § 402, 96 Stat. 57 (1982). The district court concluded on this basis that Congress did not intend interest to accrue at the T-bill rate on judgments entered before October 1, 1982. We disagree. This ambiguous move to delay the effective date of the amendment is insufficient to displace the *Bradley* presumption.

We are also guided by the principle of statutory construction that courts assume that "our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Consequently, we may assume that, when Congress passed the amendment to section 1961, as well as the entire FCIA, it was aware that courts would apply the amendment to cases pending on appeal under *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969) and *Bradley v. Board of Education*, 416 U.S. 696 (1974). In light of this, it seems unreasonable to conclude that Congress intended its delay in the effective date of the provisions of the entire Act to act as a directive to the judiciary to disregard *Thorpe* and *Bradley* and to apply the amendment prospectively.

We are unpersuaded by the *Litton* court's reasoning that awarding interest beginning on the effective date when the interest is keyed to some past date (the date of judgment) "makes no economic sense at all" and that Congress could not have intended such a result. *Litton*, 746 F.2d at 175.[17] The Court of Appeals

17. We also acknowledge the dissent's objection to retroactive application which is based on the hypothetical situation in which interest on judgments entered simultaneously may accrue at different rates depending on whether the appeal from those judgments endures beyond the effective date. However, the dissent ignores the fact that such differing results may occur in any case in

for the Second Circuit also stated in *Litton* that a party found liable would receive an "unwarranted windfall" if interest rates subsequently declined. *Id.* However, if the rates rise after entry of judgment, the prevailing party would not be fully compensated for the loss of the use of its money. It appears that Congress believed that the T-bill rate would strike an adequate balance between the dangers of windfall and undercompensation. Further, we believe that Congress sought to establish a scheme which would be easy to administer -- a goal which is undermined if more than one interest rate applies. Therefore, we find that a proper construction of the FCIA does not require that the *Bradley* presumption be set aside.

Finally, this Court has cited with approval *R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), which holds that the T-bill rate applies even with respect to judgments entered prior to the effective date of the amendments. *See Institutionalized Juveniles*, 758 F.2d at 927 n.49. We find the rule adopted by the Court of Appeals for the Eighth Circuit to be the better rule, even though it is a minority position among the circuit courts. The purpose of interest on the judgment is to preserve the value of the judgment against the diminishing effects of the time value of money, and the *Dalton* rule comes closest to achieving this objective.[18]

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which the *Bradley* presumption controls. Whether a change in the law must be applied to cases pending on appeal under *Bradley* must always rest on the fortuitous continuation of the appeal beyond the time the law to be applied underwent the change at issue.

18. *See* Note, *The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality for Too Long*, 23 Duq. L. Rev. 1083-84 (1985)(footnotes omitted) (stating that Pennsylvania's rate "represents the lowest non-variable postjudgment interest rate applied in the United States, both in the state and federal courts. At best, this represents a legislative oversight by the Pennsylvania Legislature; at worst, it is indicative of a . . . failure to grasp the realities of the modern economic world. . . .").

2. *"Manifest Injustice"*

While we find that the legislative history of the FCIA does not displace the *Bradley* presumption, the presumption may, nevertheless, be overcome if the *Bradley* exceptions for manifest injustice apply. *Bradley* requires that interest accrue prospectively in this case if such a construction would not result in "manifest injustice." 416 U.S. at 716-17. *Bradley* enunciates the following three-part test pertaining to finding "manifest injustice":

> The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon these rights.

416 U.S. at 717.

With respect to the first *Bradley* factor, the Supreme Court in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), stated that, "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights . . . are sacrificed for national purposes, . . . the court must decide according to existing laws." The plaintiffs in the present case are acting as private attorneys general in enforcing federal policy embodied in the antitrust laws. *See, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634-35 (1985) (stating that "[a] claim under the antitrust laws is not merely a private matter.") (citations omitted). We believe that an action to increase the rate at which post judgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interests. *But see*

Litton, 746 F.2d at 175.[19] When antitrust plaintiffs serve the national interest by acting as private attorneys general in enforcing the antitrust laws, the congressional mandate that plaintiffs who prevail in such a suit be awarded treble damages should not be diminished by insufficient postjudgment interest. Therefore, this factor weighs heavily against finding manifest injustice.

The second factor concerns the nature and identity of the parties. In *Bradley*, the Supreme Court stated that it "has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 416 U.S. at 720. Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

The third *Bradley* factor pertains to the nature of the impact of the change in law upon these rights. The *Bradley* Court suggested that to find manifest injustice, the Court must find that "new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." 416 U.S. at 720. This inquiry focuses on "whether the new statutory obligation, if known, would have caused the defendant to alter its conduct." *Campbell*, 809 F.2d at 576. We agree, only in part, with the Ninth

19. The Second Circuit Court of Appeals stated in *Litton* that:

> [w]hatever consideration is appropriate for antitrust plaintiffs as private attorneys general bringing suits that serve the national interest, there is little doubt that national interests are not affected by the outcome of this collateral action to secure an increase in the rate of post-judgment interest.

Litton, 746 F.2d at 175.

Circuit's analysis in *Campbell* that while "imposition of the T-bill rate for the period *prior* to the enactment or effective dates might impose unanticipated obligations on litigants, we cannot say the same for interest accruing after the delayed effective date." *Id.* As in *Campbell*, the fact that this case involves a judgment that was appealed long after the enactment date supports the position that the imposition of the T-bill rate after the effective date does not constitute an unforeseeable obligation. However, we go even further and hold that imposition of the T-bill rate would not constitute manifest injustice even for the ten month period between the December 2, 1981 judgment from which interest in this case accrues and the October 1, 1982 effective date of the amendments. We believe that the Court of Appeals for the Eighth Circuit in *Dalton* correctly applied *The Schooner Peggy* and the *Bradley* presumption to hold that the amended version of section 1961 applies as current law, regardless of whether interest begins to accrue under the statute prior to October 1, 1982.

In view of the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in the law on their rights, we conclude that application of the T-bill rate to the entire period does not result in manifest injustice. Thus, we conclude that the district court erred in applying Pennsylvania's six percent simple interest rate in this case.

C.

The July 3, 1986 Payment

On July 3, 1986, Kaiser paid Bonjorno the sum of $9,567,939.00. The United States rule provides that payments on judgments are applied first to accrued interest and then to principal, unless there is a "'clearly expressed intention [by the parties] to handle

allocation some other way.'" *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1025 (3d Cir. 1984)(quoting *Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504, 507 (5th Cir. 1973)). The court below held an evidentiary hearing to determine the intent of the parties and found that the parties intended the payment as full payment of the outstanding principal. App. at 792. The court then found that the payment "would satisfy the principal judgment and stop the accrual of post-judgment interest." App. at 793. We affirm the finding of the district court that the payment of $9,567,939.00, the exact amount of the jury award without accrued interest, was intended by all parties to be allocated to the principal sum due.

III.

CONCLUSION

In summary, we conclude that interest commenced accruing on the $9,567,939.00 jury verdict entered on December 2, 1981. For the reasons set forth above, the verdict draws interest pursuant to the amended version of 28 U.S.C. § 1961 from December 2, 1981.

Because we find that the higher T-bill rate must be applied from December 2, 1981, the July 3 payment did not stop the accrual of interest.[20] On each December 2, the anniversary of the jury verdict, a new principal is established. The July 3 payment must be subtracted from the new principal which exists just prior to the July 3, 1986 payment. Interest then accrues in the same fashion on this new principal until the judgment is paid.

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20. According to a July 27, 1982 Memorandum on Post-Judgment Interest issued by the Office of the United States Courts, interest is computed daily and compounded annually. App. at 475.

STAPLETON, *Circuit Judge*, concurring and dissenting.

I concur in the court's holding that the plaintiff should receive post-judgment interest on $9,567,939 from December 2, 1981. If the district court had not erred by vacating the judgment entered on the jury's verdict of December 2, 1981, the plaintiffs would have received post-judgment interest commencing on that date. *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987). Under the teachings of *Institutionalized Juveniles v. Secretary*, 758 F.2d 897 (3d Cir. 1985), the fact that the plaintiffs were required to litigate an appeal to fully vindicate their rights should not result in post-judgment interest commencing any later than that date.

I reject the plaintiffs' suggestion that interest should run from August 16, 1979 because I know of no logic or authority which supports the proposition that post-judgment interest should commence as of the date of a verdict *as to liability only*. Finally, I conclude that the date of the 1979 damage verdict is inappropriate as well. Where, as here, a judgment and damage verdict are vacated because the plaintiffs failed to supply evidence to support the jury's damage award and that vacation remains unchallenged, I perceive no justification for awarding post-judgment interest back to the date of the vacated verdict or judgment.

I am constrained to dissent, however, from the court's holding that the 1982 amendment to 28 U.S.C. § 1961 is applicable to this case. Like the Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits,[1] I would hold that this amendment does not

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1. *Litton Systems v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984); *U.S. v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983); *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 944 (7th Cir. 1984) (per curiam), *cert. denied* 469 U.S. 918 (1984). In a

apply to any judgment entered prior to October 1, 1982, the effective date of the amendment, without regard to whether there was an appeal from the judgment pending on that date.[2]

I would uphold the decision of the district court with respect to the applicable rate of post-judgment interest for essentially the reasons articulated by Judge Newman in *Litton Systems v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984), and by Judge Johnson in *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985). I will add only two thoughts, both of which go to the issue of whether Congress would wish the presumption of *Bradley v. Board of Education*, 416 U.S. 696 (1974) applied in connection with the amendment to § 1961.

Unlike most other legislatively established rules of law, the rule established by § 1961 after its amendment, as well as the rule established by it before, are focused on a particular point in time -- the date of the entry of judgment. On that date, under both rules, the rate of post-judgment interest is fixed once and for all time for the particular case, and the rate fixed takes effect immediately. At any time thereafter, the

July 27, 1982 memorandum to all Federal Judges, Magistrates, Court Executives, and Court Clerks, the Administrative Office of the United States Courts also adopted the position that the 1982 amendment to § 1961 should not be applied retroactively, stating:

> It is our view that the new rate will apply only to judgments entered on or after [the effective date]. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

2. *Institutionalized Juveniles v. Sec. of Public Welfare*, 758 F.2d 879, 927 (3d Cir. 1985), is not in conflict with this conclusion. The Court there held that the new post-judgment interest rate should be applied to the original order allowing the award of counsel fees which was entered on July 26, 1983, well after the effective date of the amendment.

judgment may be executed upon by the plaintiff in the absence of a supersedeas bond or may be voluntarily satisfied by the defendant whether or not there is to be an appeal. Given this focus on the date of the entry of judgment, I think it highly unlikely that Congress intended the post-judgment interest rate in a particular case to be retroactively altered in the event an appeal lasted beyond the effective date of the amendment.

The Federal Courts Improvement Act containing the amendment to § 1961 was enacted on April 2, 1982. In the Act, Congress expressly provided that "[u]nless otherwise specified, the provisions of [the] Act shall take effect on October 1, 1982." Pub.L. No. 97-164, § 402. Since Congress did not "otherwise specify" with respect to the amendment to § 1961, this effective date provision pos poned the change in the manner of establishing a post-judgment interest rate for a period of six months. Thus, Congress chose to postpone for a very substantial period the relief it was affording to plaintiffs whom it perceived as being substantially undercompensated by prevailing state interest rates. This decision suggests to me that Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates. Given that this concern is equally implicated whether or not an appeal winds up continuing beyond the effective date of the Act, I am unwilling to attribute to Congress an intent to discriminate between the holders of simultaneously entered judgments based on whether their appeals were still pending on the effective date of the Act.

For the foregoing reasons, I would affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Appellants No. 88-1396

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND NYGAARD, *Circuit Judges*

The petitions for rehearing filed by appellants in No. 88-1318 and appellants in No. 88-1396 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

Judge Stapleton would have granted rehearing in banc for the reason set forth in his dissent. Judge Becker and Judge Hutchinson would also have granted rehearing in banc.

By the Court,

Circuit Judge

Dated: February 13, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. APRIL 11th, 1988

Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby (hereinafter "Bonjorno"), trustees in liquidation and dissolution of Columbia Metal Culvert Co., Inc. ("Columbia"), filed a motion for award of post-judgment[1] interest under 28 U.S.C. §1961 against defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser"). Following briefing, oral argument, and an evidentiary hearing, for the reasons stated below, the court awards plaintiffs $2,632,886.30 in post-judgment interest.

On December 23, 1974, Columbia filed its complaint alleging that Kaiser monopolized the aluminum drainage pipe market in the mid-Atlantic region in

1. On May 30, 1980, the court ordered Bonjorno, Kerr and Clisby substituted as parties under Fed.R.Civ.P. 25(c) after Columbia was liquidated and its rights and interest in the litigation were assigned to them. The allocation of the proceeds of this litigation was in dispute and independently determined in Civil Action No. 87-1171.

violation of 15 U.S.C. §§1 and 2.[2] The court (The Honorable Edward N. Cahn) held a jury trial beginning in April, 1977;[3] at the conclusion of Columbia's case, the court granted Kaiser's motions for directed verdict on all counts. The Court of Appeals reversed and remanded the case for trial, *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir. 1978); the United States Supreme Court then denied a petition for writ of certiorari, 439 U.S. 876 (1978).

The action on remand was tried to a jury in July, 1979; on special interrogatories on liability issues, the jury returned a verdict for plaintiff on August 16, 1979. That same jury determined, also on special interrogatories, damages in the amount of $1,815,000 on August 21, 1979; the court trebled the damages as required by law and entered judgment on that verdict in the amount of $5,445,000 on August 22, 1979.

Kaiser moved for judgment n.o.v. and for a new trial; on June 17, 1981, this court granted the motion for judgment n.o.v. in part, on the ground that plaintiffs were not entitled to damages awarded for increased metal costs in years in which plaintiffs were not seeking damages; finding insufficient evidence from which a jury could award other damages, the court also granted Kaiser's motion for a new trial as to damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102 (E.D. Pa. 1981).

On retrial on damages only, a new jury awarded plaintiffs damages in the amount of $3,189,313 on

2. The judgment giving rise to this motion was entered on December 4, 1981, vacated in part by this court on January 18, 1983 and reinstated by the Court of Appeals on December 27, 1984. A statement of plaintiffs' claims in the underlying litigation may be found in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *affirming in part and reversing in part*, 518 F. Supp. 102 (E.D. Pa. 1981).

3. This case was transferred from the docket of The Honorable Edward N. Cahn to this court's docket on October 20, 1978.

December 2, 1981. The court entered judgment for plaintiffs on the jury verdict in the trebled amount of $9,567,939 on December 4, 1981. Kaiser filed timely motions for judgment n.o.v. and a new trial. The court granted Kaiser's motion for judgment n.o.v. as to part of the damages awarded, vacated the December 4, 1981 judgment, and entered judgment on January 18, 1983 on damages in the trebled amount of $4,651,560. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983).

Bonjorno appealed the court's partial grant of judgment n.o.v. on damages; Kaiser appealed the failure of the court to grant a new trial or to grant in full its motion for judgment n.o.v. On December 27, 1984, the Court of Appeals affirmed the liability determination, affirmed the court's grant of a new trial on damages, reversed the court's partial grant of judgment n.o.v. on the jury award of December 2, 1981, vacated the judgment entered January 18, 1983, and reinstated the $9,567,939 judgment entered on the jury's damage award of December 2, 1981. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984). Kaiser filed a petition for rehearing *en banc* that the Third Circuit denied, Circuit Judges Adams and Becker dissenting. Kaiser filed a petition for a writ of certiorari with the Supreme Court on June 6, 1985; the Third Circuit stayed the issuance of its mandate pending the resolution of the petition for writ of certiorari. On June 23, 1986, the Supreme Court denied defendants' petition with Justice White dissenting. ___ U.S. ___, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986).

Because the Third Circuit's December 27, 1984 opinion was silent concerning allowance of post-judgment interest, Bonjorno petitioned the Third Circuit on June 24, 1985 to include in the mandate instructions regarding interest in accordance with Fed.R.App.P. 37. Before the Third Circuit issued the mandate, counsel for plaintiffs and Kaiser stipulated that this court should

first address all issues of interest allowable under 28 U.S.C. §1961 and Fed.R.App.P. 37. The Third Circuit approved that stipulation on July 1, 1986 and certified the judgment in lieu of a formal mandate. On July 3, 1986, Kaiser paid $9,567,939 to plaintiffs.

The stipulation stated, in relevant part:

> 1. The mandate (or certified copy of the judgment in lieu of a mandate) shall issue to the United States District Court for the Eastern District of Pennsylvania immediately, and shall state that the District Court should consider all issues regarding the calculation of interest in this case. . . .
>
> 3. Defendants – Appellees – Cross Appellants ("Defendants") agree that they will not contend that Plaintiffs have waived any procedural or substantive claim for interest by this Court [the Court of Appeals] not considering the issue of interest.

The Court of Appeals' certified judgment did not instruct this court on determining issues of post-judgment interest.

The federal statute governing awards of post-judgment interest in effect when Columbia filed its complaint on December 23, 1974, stated:

> Interest shall be allowed on any *money judgment* in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

(Emphasis added). 28 U.S.C. §1961 (1976). On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982 which, *inter alia,* amended 28 U.S.C. §1961, effective October 1, 1982. *See* Pub.L. No. 97-164,

§§304(a), 402 (1982). The present statute states in part:

> (a) Interest shall be allowed on any *money judgment* in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.[4]

(Emphasis added).

Bonjorno is entitled to post-judgment interest because of the mandatory language in both prior and amended §1961: "Interest *shall* be allowed on any money judgment in a civil case recovered in a district court . . . . from the date of the entry of the judgment . . . ." 28 U.S.C. §1961(a) (1987); 28 U.S.C. §1961 (1976). The questions before the court are the date from which interest accrues and the rate of interest.

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4. Unless noted otherwise, the court will refer to 28 U.S.C. §1961(a) as "amended §1961(a)" and refer to the statute in effect until October 1, 1982 as "prior version of §1961."

The claims upon which plaintiffs obtained a money judgment arose under the Sherman Act, 15 U.S.C. §§1 and 2, a federal statute; questions concerning the award of post-judgment interest are governed by federal law. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1024 (3d Cir. 1984), *cert. denied sub nom., Technograph, Inc. v. General Motors Corp.*, 474 U.S. 819 (1985); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 675 (9th Cir. 1973). The federal statute governing awards of interest upon money judgments is interpreted liberally to achieve equity. *See National Bank of the Commonwealth v. Mechanics National Bank*, 94 U.S. 437 (1877) (equitably construing a predecessor statute to 28 U.S.C. §1961 to allow interest to run from the date of verdict where appreciable time elapsed between verdict and entry of judgment and plaintiff was not at fault for the delay); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir. 1987) (rejecting a "narrow" interpretation of 28 U.S.C. §1961 and interpreting the phrase "date of entry of judgment" to mean "date of verdict" where there was a three-month delay from verdict to entry of judgment).

1. Date Accrual of Interest Begins

The issue concerning the date from which plaintiffs are entitled to receive interest depends on "the date of the entry of the judgment" when the judgment below has been modified or reversed in part on appeal. Under Fed.R.App. 37,[5] if a district court judgment is affirmed,

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5. "Unless otherwise provided by law, *if a judgment for money* in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money may be entered in the district court, *the mandate shall contain instructions with respect to allowance of interest.*"
Fed.R.App.P. 37 (emphasis added).

post-judgment interest accrues from the date the judgment was entered in the district court. However, if a district court judgment is modified or reversed with appellate court direction to enter a money judgment, the Court of Appeals has wide discretion to review the facts and equities and include instructions with respect to the allowance of interest in its mandate. *See generally* Fed.R.App.P. 37 notes of advisory committee. Federal Rule of Appellate Procedure 37 is a "reminder" that a party should seek a recall of the mandate where it is silent as to entry of post-judgment interest. *See* Fed.R.App.P. 37 notes of advisory committee. A district court lacks the power to award post-judgment interest where the mandate from the appellate court directs entry of judgment upon a verdict but is silent concerning interest. *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948).

In the instant case, *before* the Court of Appeals issued its mandate, the parties entered a stipulation allowing this trial court to consider "all issues regarding the calculation of interest" and the Court of Appeals approved this stipulation. At oral argument, both parties stated they interpreted that stipulation to grant this court the same discretion to determine when interest began to run as if the question were before the Court of Appeals when issuing its mandate. Because the Court of Appeals vacated this court's January 18, 1983 judgment and ordered reinstatement of the December 4, 1981 judgment and, in modifying or reversing judgment, had the power under Fed.R.App.P. 37 and §1961 to consider the facts and equities regarding an award of interest, this court may reasonably assume it has been granted authority by the Court of Appeals to consider the law and the equities of this case in deciding the issues presented by plaintiffs' motion for award of interest on the judgment.

Bonjorno originally contended that interest accrued from August 16, 1979, the date the jury returned a

verdict on liability in favor of Columbia, because Kaiser's liability was then "fixed by the jury." However, Bonjorno now contends that the court should award interest on the judgment from August 22, 1979, the date the district court entered judgment on liability, because liability was ultimately affirmed by the Court of Appeals, *see Bonjorno,* 752 F.2d 802. Relying on case law from other circuits, an article by Professor Curtis R. Reitz,[6] the equitable construction a court should give §1961, and Fed.R.App.P. 37, Bonjorno now argues that "an award of interest can properly pre-date the controlling judgment which vests the successful litigant's right to interest [and to collect a money judgment]." (Plaintiffs' brief at 27).

Kaiser, on the other hand, contends that interest accrues only from July 1, 1986, the date the Court of Appeals issued its certified judgment in lieu of a mandate, because only then was there a "final judgment" on liability *and* damages. Kaiser argues that on August 16, 1979, Columbia had an unliquidated liability verdict only and, even on August 22, 1979, Columbia did not

6. Reitz, *Interest on Judgments in Federal Litigation: 28 U.S.C. §1961* (October 1986) (unpublished). It is instructive to note that plaintiffs commissioned Professor Reitz to write his article for their use in support of their motion to award post-judgment interest. Professor Reitz cannot be considered an impartial expert or scholar in regard to this case. However, the court rejects his views as inapplicable not on that ground but on their inconsistency with case law and the equities of this case. Professor Reitz proposes a theory of statutory and case law interpretation under which interest accrues from the date judgment was entered on liability only, August 22, 1979, but plaintiffs' *right* to an award of interest under §1961 "vests" on the date of the "controlling judgment" (the date plaintiffs allege the Court of Appeals resolved all questions of liability and amount of damages recoverable, December 27, 1984). Applying Professor Reitz's thesis, which has not yet been adopted by any court, interest should be awarded from August 22, 1979, but at the rate in effect on December 27, 1984 under amended §1961(a) because plaintiffs' right to interest "vested" after October 1, 1982, the effective date of amended §1961(a).

have a final judgment remaining ultimately unchanged on its merits. Kaiser claims interest cannot accrue until the district court enters judgment after issuance of the mandate.

The relevant Third Circuit decision in determining from when post-judgment interest accrues if a lower court judgment is modified or reversed on appeal is *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897 (3d Cir. 1985). In *Institutionalized Juveniles,* the district court issued an order awarding attorneys' fees under 42 U.S.C. §1988 on July 26, 1983. On appeal, the Court of Appeals vacated and remanded for recalculation of the fees. The court, in accordance with Fed.R.App.P. 37, directed the district court to allow post-judgment interest on the recalculated amount from the date the correct award would have been entered had the district court not erred. *Id.* at 927. The correct date was July 26, 1983, the date of the original district court order.

In *Institutionalized Juveniles,* 758 F.2d at 927, the Third Circuit "adopt[ed] the rule set out in" *Perkins v. Standard Oil Co. of California,* 487 F.2d 672 (9th Cir. 1973). The Ninth Circuit had reduced two awards of attorneys' fees and affirmed a third award. *Perkins v. Standard Oil Co. of California,* 474 F.2d 549 (9th Cir.), *cert. denied,* 412 U.S. 940 (1973). The issue before the court was post-judgment interest on the reduced awards. The *Perkins* court held that the reduction of awards was a partial affirmance of the district court judgment and that interest would run from the date the district court awarded the excessive fees. *Perkins,* 487 F.2d at 676. The court stated that, "interest should run from the date of entry of the original judgment because that is the date on which the correct judgment should have been entered." *Id.* Other appellate courts apply the *Perkins* approach. *See Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985); *R.W.T. v. Dalton,* 712 F.2d 1225 (8th Cir.), *cert. denied,* 464 U.S. 1009 (1983) (cited with

approval in *Institutionalized Juveniles); Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (in banc) (cited with approval in *Institutionalized Juveniles*). *Contra Harris v. Chicago Great Western Ry*, 197 F.2d 829 (7th Cir. 1952) (rejected by *Institutionalized Juveniles* at note 48). *Compare City of Detroit v. Grinnell Corp.*, 575 F.2d 1009 (2d Cir. 1977) (applying *Perkins* approach) *with Powers v. New York Central Railroad*, 251 F.2d 813 (2d Cir. 1958) (rejecting *Perkins* approach).

The *Perkins* court stated that there is no difference between the application of 28 U.S.C. §1961 and Fed.R.App.P. 37 to attorneys' fees award cases and other judgments modified or reversed on appeal. The Court of Appeals for the Third Circuit has not yet held that the *Institutionalized Juveniles* rule applies not only to attorneys' fee awards but also to modified or reversed judgments. However, it expressly adopted the "rule set out in *Perkins*," *Poleto*, 826 F.2d at 1281, so that it appears appropriate for this court to do so. It is also fair and equitable.

Had there been no error by this court, judgment on liability and damages would have been entered December 4, 1981. The August 16, 1979 verdict on liability alone was insufficient under Fed.R.Civ.P. 54(c) to allow or require the court to enter judgment, because the plaintiff, having been harmed, was entitled to money damages as relief. *Cf.* Fed.R.Civ.P. 54(c) ("[E]very final judgment *shall* grant the relief to which the party in whose favor it is rendered is entitled, ...) (emphasis added); 15 U.S.C. §15(a) (1987) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall* recover threefold the damages by him sustained, ...") (emphasis added). The court entered judgment on August 22, 1979 only after the jury returned verdicts as to liability *and* damages. Kaiser filed timely motions for a

new trial and for judgment notwithstanding the verdict; the court granted Kaiser's motion for a new trial on damages because Columbia offered insufficient evidence to support the jury verdict at the first trial on damages. The Court of Appeals upheld the grant of a new trial on damages. It was not until December 4, 1981, after the new trial on damages, that the court entered the judgment on damages trebled in the amount of $9,567,939. Although this court granted Kaiser's motion for judgment n.o.v. as to part of that damages verdict, the Court of Appeals reversed. It was the district court judgment of December 4, 1981 that the Court of Appeals reinstated and affirmed.

Therefore, the proper judgment for purposes of calculating post-judgment interest is this court's judgment of December 4, 1981. In *Poleto*, 826 F.2d at 1279-81, the Third Circuit held that post-judgment interest under §1961 is calculated from the date of the verdict underlying the appropriate judgment. Interest is awarded from December 2, 1981, the date of the jury verdict in the amount of $3,189,313, trebled to calculate the amount of judgment. The amount of the judgment was first determinable on that date. This result is consistent with the "purpose of post-judgment interest [, which] is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Id.* at 1280.

2. Interest Rate

Having determined that post-judgment interest accrues from December 2, 1981, the court must decide the appropriate rate of interest. Prior §1961 required that interest accrue "at the rate allowed by State law." Post-judgment interest was calculated at the rate established by the state in which the federal court sat; Pennsylvania's post-judgment interest rate was at all

relevant times 6% simple interest. *See* 42 Pa.C.S.A. §8101 (1982); 41 Pa.C.S.A. §202 (1987).[7]

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982, effective October 1, 1982, which amended §1961. Pub.L. No. 97-164, tit. III, pt.B, §302, 96 Stat. 25, 55-56 (1982) (codified in part at 28 U.C.S. §1961 (1982)). This act provided that varying state interest rates would no longer determine the interest rate on federal judgments. Instead, there would be a national interest rate that would be "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment," 28 U.S.C. §1961(a) (1987) (hereinafter "the T-bill rate"), and further provided that interest "shall be compounded annually." 28 U.S.C. §1961(b) (1987). Congress did not amend the requirement that interest be calculated "from the date of the entry of the judgment," 28 U.S.C.A. §1961(a) (1987).

The issue presented is whether the amendments to §1961 apply to money judgments entered prior to October 1, 1982,[8] the effective date of the amendments. A

7. Title 42 Pa.C.S.A. §8101 (1982) provides:

> Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.

Title 41 Pa.C.S.A. §202 (1987) provides:

> Reference in any law or document enacted or executed heretofore or hereafter to "legal rate of interest" and reference in any document to an obligation to pay a sum of money "with interest" without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum.

8. In their briefs, plaintiffs argue vigorously that the issue is not whether to apply amended §1961 "retroactively," but to determine the "retrospective intent of the amended statute." *See e.g.*, plaintiff's reply brief at p. 45. Regardless of the jargon used, the court must determine whether Pennsylvania's 6% simple interest rate or a T-bill rate of interest compounded annually accrues on a judgment entered December 4, 1981. For ease of discussion, the court will use the phrase "retroactive application."

Poleto determined that for purposes of §1961 the "date of the entry of the judgment" was the date of the underlying verdict. Because both the effective verdict and judgment in the instant action predated the effective date of the amendments to §1961, the court needed not decide whether the amendments apply when the verdict was reached before October 1, 1982 but the judgment thereon was entered after that date.

number of circuit courts have addressed this issue and reached differing results; the Third Circuit has not squarely addressed the issue. There are three principal interpretations: (1) amended §1961 applies only to a judgment entered after October 1, 1982 and post-judgment interest at the applicable state law rate accrues on a judgment entered before October 1, 1982 during the period *before* and *after* October 1, 1982; *see Brooks v. United States*, 757 F.2d 734, 741-43 (5th Cir. 1985); *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943 (7th Cir. 1984) (per curiam); *United States v. Dollar Rent-A-Car Systems*, 712 F.2d 938, 940 n.5 (4th Cir. 1983); *United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd without opinion*, 729 F.2d 1450 (3d Cir. 1984); *Peterson v. Crown Financial Corp.*, 553 F. Supp. 114, 116-17 n.4 (E.D. Pa. 1982); (2) amended §1961 applies to a judgment entered before October 1, 1982 but affirmed thereafter; post-judgment interest at the T-bill rate accrues on the judgment during the period before and after October 1, 1982, *see R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983);[9] and (3) amended §1961 applies in part to a

9. In *Dalton*, the Eighth Circuit, in 1983, affirmed an attorneys' fee award of March 30, 1982 and allowed interest under

judgment entered before October 1, 1982; post-judgment interest on such judgment accrues at the state law rate until October 1, 1982 and at the T-bill rate after October 1, 1982, *see Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987).[10]

Based on different legal theories, Bonjorno and Kaiser agree that the T-bill rate is the proper post-judgment interest rate and amended §1961 applies to this case. Bonjorno's argument depends on a difference between the date from which interest accrues and the date on which it is determined that it will accrue ("vesting date"). Bonjorno, relying on Professor Reitz's article, argues that although interest on the judgment should run from August 22, 1979, the right to post-judgment interest vested on December 27, 1984, the date the Court of Appeals affirmed a judgment of liability and damages against Kaiser. Bonjorno argues that interest begins accruing on August 22, 1979, at the T-bill rate in effect on December 27, 1984 when the right to

NOTES *(Continued)*

amended §1961 from that date. The only explanation for applying amended §1961 retroactively was because "it is the law [at the time of the affirmance] and should be used by the District Court." *Dalton*, 712 F.2d at 1235. Plaintiffs in *Dalton* were a class of juveniles who challenged the constitutionality of Missouri's practice of detaining juveniles without first holding a probable cause hearing. Unlike the instant private antitrust action, *Dalton* involved an issue of substantial public interest, so retroactive application of amended §1961 was appropriate. *See Bradley v. School Board*, 416 U.S. 696, 718-19 (school desegregation litigation renders substantial public benefit, unlike "mere private cases between individuals"); *infra* at pp. 15-16.

10. This court finds *Campbell*, 809 F.2d 563, inapposite to the case at bar. *See Id.* at 577-79 (Wiggins, J. dissenting). *Campbell* involved a unique factual situation (judgment entered after the enactment of amended §1961 but before its effective date). The *Campbell* court limited its holding to actions involving judgments against the United States, and acknowledged that the *Bradley* analysis might give a different result where private parties were involved.

post-judgment interest vested. The court finds this argument specious.

Kaiser, relying on *Litton*, 746 F.2d 168, contends that when interest begins to accrue before October 1, 1982, the prior version of §1961 applies to the entire period of post-judgment interest, but when interest begins to accrue after October 1, 1982, amended §1961 applies. Kaiser argues that the date from which interest accrues is July 1, 1986, so Kaiser agrees that the court should calculate interest at the T-bill rate, not from August 22, 1979 but from July 1, 1986, when the Court of Appeals certified the judgment in lieu of a formal mandate.

The court has rejected these theories on the "vesting date" in deciding that interest accrues from December 2, 1981. Therefore, the court must decide whether amended §1961 applies retroactively. "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board*, 416 U.S. 696, 711 (1974). *Accord Campbell*, 809 F.2d at 569; *Brooks*, 757 F.2d at 741; *Litton*, 746 F.2d at 172.

Three factors are relevant in deciding whether manifest injustice will occur from retroactive application of amended §1961: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717.

Retroactive application here will result in manifest injustice. First, retroactive application of statutes is not favored where only private rights and private parties are involved. *See United States v. Schooner Peggy*, 4 U.S. (1 Cranch) 103, 110 (1801). The parties to this action are private parties; a civil antitrust action between private parties does not implicate "great national concerns" sufficient to justify retroactive application of amended §1961. *See Id.; See also supra* notes 9 and 10.

Second, a court will not "apply an intervening change [in law] to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that has matured or become unconditional." *Bradley*, 416 U.S. at 720. Kaiser had a right to rely on interest accruing at Pennsylvania's simple 6% rate. On March 15, 1985, two and one-half years after the effective date of amended §1961, Bonjorno stated to the Court of Appeals in the response to a motion for order staying issuance of the mandate:

> Interest is accruing on this judgment at a rate of only six percent, compared to substantially greater rates of money market interest. Section 1961(a) of Title 28 U.S.C., as amended in 1982, is apparently not retroactive to judgments, such as the 1981 judgment in the present case, entered prior to the effective date of the 1982 amendment. The continuing prejudice to the plaintiffs-appellants of a non-compensatory rate of interest, extending through the summer recess of the Supreme Court, is unfair.

Although this court has not considered Bonjorno estopped or bound by this representation, on this earlier occasion when seeking to influence action by the Court of Appeals in favor of plaintiffs, Bonjorno did represent to that Court that plaintiffs were entitled to interest only at the Pennsylvania legal rate both before and after October 1, 1982. This was then the common understanding of both parties and this court.

Third, a court will not apply a statute retroactively where the intervening change in law would impose an additional or unforeseeable obligation on a party without notice or an opportunity to be heard. *Id.* at 720. Central to this determination is whether Kaiser would have acted differently had it realized its new statutory obligation on October 1, 1982. *See Id.* at 721. The appeals of Kaiser to the Court of Appeals and the petition for certiorari to the Supreme Court were not frivolous and

not for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending. But, Kaiser might have chosen to pay the amount of the judgment earlier had it reason to believe that interest after October 1, 1982 would compound at a rate of more than 6%. It would be manifestly unjust to Kaiser to apply amended §1961 by calculating interest at the higher T-bill rate as of October 1, 1982 or any time prior thereto when the amendments to §1961 did not become effective until October 1, 1982. *See Brooks*, 757 F.2d at 743; *Litton,* 746 F.2d at 175-76; *but see Campbell*, 809 F.2d at 575-76 (in action against United States, where judgment entered after enactment of amendment but before effective date, amended §1961 applied to period after effective date of amendment).

There is also statutory language and legislative history of the 1982 amendments suggesting that amended §1961 should be applied prospectively only. *Litton,* 746 F.2d at 174. *Accord Brooks*, 757 F.2d at 742. Amended §1961 did more than alter the post-judgment interest rate; it established a new method of computing an interest rate by averaging interest rates fifty-two weeks prior to the date judgment is entered; this statutory method is inextricably tied to the date of judgment and suggests application only to judgments entered after its passage.

The legislative history of the §1961 amendments suggests that Congress adopted a national post-judgment interest rate to insure that interest on federal judgments would be uniform and the interest rate would reflect the commercial interest rate at the time judgment is entered. The Court of Appeals has stated that the policy underlying awards of post-judgment interest under 28 U.S.C. §1961 is "compensation of the wronged party for loss of the use of money, in a changing economy where changes in the . . . statutory interest rate reflect changes in the value of

the use of money." *Devex,* 749 F.2d at 1024. By compensating for the loss of use of money at market interest rates Congress intended in part to eliminate the economic incentive for defendants to take frivolous appeals. S. Rep. No. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 1.

There is little guidance in the legislative history concerning application of these amendments to unpaid judgments entered prior to enactment. *See also Campbell*, 809 F.2d 563, 566 (reviewing the legislative history of the amendments to §1961). But, Congress did not provide that these amendments were effective immediately regardless of concern for successful plaintiffs who might continue to be deprived of T-bill rates of interest higher than legal interest. Instead, Congress specifically postponed the effective date for six months from passage on April 2, 1982 until October 1, 1982. Pub. L. No. 97-164, §402 (1982). There is at least a permissible inference that Congress did not intend interest at the T-bill rate to accrue on judgments entered before October 1, 1982, the effective date of the amending legislation. *See Litton,* 746 F.2d at 174; *Brooks,* 757 F.2d at 742; *cf. Campbell*, 809 F.2d at 574 (finding a "fair indication" that amended §1961 does not apply to judgments entered before the *enactment* date of the amendments, April 2, 1982).

It has been argued that even if amended §1961 does not apply to interest accruing on judgments entered before its effective date, the new interest calculations apply to any interest period thereafter. However, under both prior §1961 and amended §1961, once the judgment is entered interest is fixed as of that date and accrues at that same rate until the judgment is paid. The interest rate on judgments has been fixed not fluctuating both before and after the amendments to 28 U.S.C. §1961. The amending legislation contains no special rule for judgments entered before October 1, 1982 or between April 2 and October 1, 1982.

Our conclusion that amended §1961 is not retroactive is reinforced by the Court of Appeals' decision in *Devex,* 749 F.2d 1020, a patent infringement action, where the district court awarded damages in 1980. The Court of Appeals affirmed the damages judgment in 1981. In 1983, the district court, applying the prior version of §1961, awarded post-judgment interest at the interest rate under Delaware state law in 1980. The Court of Appeals affirmed without discussing possible retroactive application of amended §1961. *Id.* at 1023-24. Although it is not apparent from the decision whether the Court of Appeals considered the retroactivity issue, its decision implicitly held that amended §1961 does not apply to a judgment entered in a purely private action before the effective date of the amendments.

Decisions by other members of this court also support this determination. In *Peterson,* 553 F. Supp. at 116-17 n.4, Judge Pollak, reviewing the legislative history of amended §1961, concluded that "there is no indication that [amended §1961] was meant to have retroactive effect" and calculated the interest rate "as was mandated by §1961 as it stood on the date of entry of judgment." Similarly, in *Billows Electric Supply,* 557 F. Supp. at 516, Judge Broderick held that "the clear language as to the effective date of the Act compels the conclusion that the new market-based rates of postjudgment interest shall not apply to judgments entered prior to October 1, 1982." It would appear that courts in this Circuit have uniformly assumed the correctness of the holding herein that prior §1961 applies to judgments entered while it was in effect and amended §1961 applies to judgments entered on and after its effective date.[11]

Bonjorno is entitled to interest beginning December 2, 1981. Under the interest provision then effective,

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11. If the Court of Appeals determines that interest should accrue beginning July 1, 1986, a T-bill interest rate should apply.

post-judgment interest accrues at the Pennsylvania statutory rate of 6% simple interest. That rate did not change to any average T-bill rate on April 2, 1982 or on October 1, 1982. Having considered the *Bradley* factors, there is no cause for applying amended §1961 retroactively in general. ***But see supra*** notes 9 and 10. In this case, doing so would not comport with substantial justice.

3. Interest Sum

The court must next decide the amount of money on which interest accrued. Kaiser argues that the court should calculate interest on the single damage verdict of $3,189,313 awarded by the jury on December 2, 1981; Bonjorno contends that interest must accrue on the damages trebled, *i.e.*, $9,567,939, the amount of the money judgment reinstated and affirmed by the Court of Appeals. Whether post-judgment interest in a private antitrust suit accrues on single or treble damages has not been decided by the Court of Appeals for the Third Circuit.

There are three purposes for treble damages in private antitrust actions: deterrence, compensation, and punishment.

> It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. But treble damages were also designed to deter future antitrust violations. Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages 'make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit' under the antitrust laws.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982) (citations omitted); *accord Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962-63 (3d Cir. 1983), *cert. denied*,

465 U.S. 1024 (1984). Treble damages under 15 U.S.C. §15 may also be "partially justifiable on compensatory grounds" because "an antitrust violation often involves numerous intangible economic harms." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 and n.36 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

Interest is not usually awarded on penalties or punitive damages, because these damages are not intended to compensate a victim; interest on punitive damages is not necessary to compensate the plaintiff for the loss of the use of the amount awarded. *Cf. Devex*, 749 F.2d 1024-26 (denying an award of interest on unpaid post-judgment interest). But the Supreme Court has refused to classify treble damages solely as a "penalty" or "punitive." This court is bound by its determination that the primary purpose of treble damages under 15 U.S.C. §15 is to encourage private parties to enforce the antitrust laws and undertake difficult litigation. *Mechanical Engineers*, 456 U.S. at 575. Post-judgment interest on the trebled damages should not be denied because ***part*** of their purpose may be punitive.

There is nothing in the language or legislative history of §1961 supporting the denial of interest on trebled damages. Where a jury properly determines in a civil suit that a defendant is liable under the antitrust laws and awards damages, the court is required to treble the damages and enter judgment in the amount of the damages as trebled. 15 U.S.C. §15. Section 1961 provides for interest "on any money judgment," not just interest on actual damages or the amount of the verdict.

Although counsel have not directed the court to other cases specifically addressing this issue, other courts have awarded interest on trebled damages without explanation. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 845-47 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (awarding interest on

the trebled damages reduced on remittitur, not the actual damages jury awarded). Therefore, the court awards Bonjorno post-judgment 6% simple interest on the damages trebled in the amount of $9,567,939, with interest accruing from December 2, 1981.

4. Date Accrual of Interest Ends

The last issue before the court is whether post-judgment interest continued to accrue after July 3, 1986, when Kaiser paid Bonjorno the principal sum of $9,567,939. The United States rule provides that payments on judgments are applied first to accrued interest and then to principal, unless there is a "clearly expressed intention by the parties to handle allocation some other way." *Devex*, 749 F.2d at 1025.

Kaiser argues that the parties intended Kaiser's payment of the exact amount of the money judgment two days after the mandate issued to constitute full payment of the judgment not payment in part applied first to interest due. Bonjorno contends that the plaintiffs never intended to alter application of the United States rule. The court held an evidentiary hearing to determine the intent of the parties.

The court finds, based on the testimony including the demeanor of the witness, the exhibits, and the facts and circumstances of this case known to the court, that the parties, at or around the time payment was made, by their words and actions clearly expressed their intent to treat the July 3, 1986 payment as full payment of the outstanding principal.

After the Supreme Court denied Kaiser's petition for writ of certiorari, counsel for Bonjorno filed before the Court of Appeals on June 24, 1986, a "motion pursuant to Fed.R.App.P. 37 for inclusion in mandate of instructions regarding interest." In support of this motion, counsel for Bonjorno wrote "because plaintiffs have waited many years for payment of the principal damage

award in this case, there is no need to delay the payment of this judgment pending resolution of interest issues by this court." Plaintiffs' brief in support of motion at 11.

Counsel for the parties then negotiated a stipulation to allow this court to determine the post-judgment interest issues. The court finds credible the statement of counsel for Kaiser that plaintiffs' counsel agreed to enter this stipulation on the condition that Kaiser pay the full principal due as soon as possible after issuance of the mandate. If the parties had not agreed to the stipulation, Bonjorno would have had to wait for the Court of Appeals to decide the post-judgment interest issues, which would have delayed further issuance of the mandate and payment of the principal. The court also finds credible the representation of Kaiser's counsel that Kaiser agreed to the stipulation and paid $9,567,939 in order to stop the accrual of post-judgment interest. Plaintiffs did not offer in response any credible explanation why the parties entered the stipulation.

On June 27, 1987, counsel for plaintiffs sent Kaiser's counsel the proposed stipulation; in the cover letter, Bonjorno's counsel stated, "Please ask your client to wire funds in the amount of $9,567,939. . . . It is our position that interest is due from August 16, 1979 to the date of payment (June 30, 1986)." Defendants' Exhibit K-1.[12] The court agrees with defense counsel that this letter is additional evidence showing an agreement between the parties that Kaiser's $9,567,939 payment would satisfy the principal judgment and stop the accrual of post-judgment interest. The court also draws an inference of intent to apply the payment to principal first where the sum Bonjorno requested and Kaiser paid was equal to the original principal owed.

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12. Although Bonjorno expected to be paid the judgment on June 30, 1986, the mandate did not issue until July 1, 1986; Kaiser paid $9,567,939 on July 3, 1986.

In an attempt to rebut this evidence of the parties' clearly expressed intent to apply the July 3, 1986 payment to the principal, counsel for Bonjorno called as a witness one of its attorneys, Michael M. Baylson, Esquire. The court cannot credit Mr. Baylson's testimony that Bonjorno's attorneys were aware of, but intentionally failed to discuss, the *Devex* case and the United States rule in negotiating the stipulation with Kaiser, especially since it would have been unethical to intentionally allow Kaiser to misconstrue the effect of the stipulation.

The court rejects Mr. Baylson's explanation that his June 27, 1986 letter was intended only to inform Kaiser of plaintiffs' position on post-judgment interest issues; the plain language of the letter in the circumstances then obtaining shows an intent to apply the $9,567,939 payment to principal and to stop accrual of interest on the date Kaiser paid $9,567,939. The United States rule does not require the parties to mention the rule by name when expressing intent to allocate payments to principal not interest. The court finds clearly expressed a mutual intent to apply the July 3, 1986 payment to principal and not accrued interest.

Federal law also determines whether Bonjorno should be allowed interest on interest. *Devex,* 749 F.2d at 1024. Although not raised by the parties, the court expresses its opinion on this matter also in the hope of bringing this lengthy litigation to a close. In *Devex,* where the parties also agreed that payments applied to principal and changed the United States rule otherwise applicable, the Court of Appeals held that allowing interest on the post-judgment interest would amount to the illegal compounding of interest and should not be awarded. *Devex,* 749 F.2d at 1025.

To summarize, plaintiffs are entitled to post-judgment interest at 6% annual simple interest on a principal judgment of $9,567,939, accruing from December 2, 1981 to July 3, 1986. In the opinion of this

judge, based on the extended litigation before her, the law and all the equities, this is a fair and appropriate resolution of the issues delegated to this court by the Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 11th day of April, 1987, upon consideration of plaintiffs' motion to award post-judgment interest, defendants answer to the motion, and plaintiffs' reply thereto, and following oral argument and an evidentiary hearing held thereon, it is ORDERED that the motion is GRANTED: defendants shall pay plaintiffs post-judgment interest in the amount of $2,632,886.30, calculated as follows: interest period (December 2, 1981 to July 3, 1986) = 4 years, 214 days
interest owed = ($9,567,939) × (6%) × (4+(214/365))
= $2,632,886.30

Norma L. Shapiro
J.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 27, 1982

MEMORANDUM

TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Court Executives

SUBJECT: Post-Judgment Interest—
Our Memorandum of June 22, 1982

I. Effective Date

There have been several recent inquiries to this office as to the interest rate which should apply to judgments entered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (section 302(a), amending 28 U.S.C. § 1961). It is our view that the new rate will apply only to judgments entered on or after that date. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

II. Correction to Prior Memorandum

We have been advised that many small hand-held calculators will drop any digits more than two places to the right of the decimal point—thus giving different answers to the two equations contained in our June 22nd memorandum. Because the daily interest rate computed under equation #1 will be a very small number, it may be easier to use equation #2 on any

hand-size calculators. If you get different answers depending upon whether you use equation #1 or equation #2, the problem is in the calculator.

The difficulty of assuring accuracy in the calculation of interest is illustrated by errors on page 4 of our memorandum, in which the assumed interest rate in both equations was shown as 14.26 percent but should have read 14.62 percent. Please substitute the two attached pages for pages three and four of the June 22nd memorandum.

It seems advisable to emphasize again that in most cases the parties should be expected to perform the calculations of the applicable interest rate. This information is being provided so that judicial officers and employees can be responsive to questions on this issue.

Sincerely

Carl H. Imlay
General Counsel

Enclosures

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
September 23, 1988	October 20, 1988	8.04%
October 21, 1988	November 17, 1988	8.15%
November 18, 1988	December 15, 1988	8.55%
December 16, 1988	January 12, 1989	9.20%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
September 23, 1988	October 20, 1988	8.04%
October 21, 1988	November 17, 1988	8.15%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
January 16, 1987	February 12, 1987	5.75%
February 13, 1987	March 12, 1987	6.09%
March 13, 1987	April 9, 1987	6.04%
April 10, 1987	May 7, 1987	6.30%
May 8, 1987	May 11, 1987	6.30%
May 12, 1987	June 4, 1987	7.02%
June 5, 1987	July 2, 1987	7.00%
July 3, 1987	July 30, 1987	6.64%
July 30, 1987	August 4, 1987	6.64%
August 5, 1987	August 27, 1987	6.98%
August 28, 1987	September 1, 1987	6.98%
September 2, 1987	September 24, 1987	7.22%
September 25, 1987	September 30, 1987	7.22%
October 1, 1987	October 22, 1987	7.88%
October 23, 1987	November 19, 1987	6.90%
November 20, 1987	December 17, 1987	6.93%
December 18, 1987	January 14, 1988	7.22%
January 15, 1988	February 11, 1988	7.14%
February 12, 1988	March 10, 1988	6.59%
March 11, 1988	April 7, 1988	6.71%
April 8, 1988	May 5, 1988	7.01%
May 6, 1988	June 2, 1988	7.20%
June 3, 1988	June 30, 1988	7.59%
July 1, 1988	July 28, 1988	7.54%
July 29, 1988	August 25, 1988	7.95%
August 26, 1988	September 22, 1988	8.32%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
January 16, 1987	February 12, 1987	5.75%
February 13, 1987	March 12, 1987	6.09%
March 13, 1987	April 9, 1987	6.04%
April 10, 1987	May 7, 1987	6.30%
May 8, 1987	May 11, 1987	6.30%
May 12, 1987	June 4, 1987	7.02%
June 5, 1987	July 2, 1987	7.00%
July 3, 1987	July 30, 1987	6.64%
July 30, 1987	August 4, 1987	6.64%
August 5, 1987	August 27, 1987	6.98%
August 28, 1987	September 1, 1987	6.98%
September 2, 1987	September 24, 1987	7.22%
September 25, 1987	September 30, 1987	7.22%
October 1, 1987	October 22, 1987	7.88%
October 23, 1987	November 19, 1987	6.90%
November 20, 1987	December 17, 1987	6.93%
December 18, 1987	January 14, 1988	7.22%
January 15, 1988	February 11, 1988	7.14%
February 12, 1988	March 10, 1988	6.59%
March 11, 1988	April 7, 1988	6.71%
April 8, 1988	May 5, 1988	7.01%
May 6, 1988	June 2, 1988	7.20%
June 3, 1988	June 30, 1988	7.59%
July 1, 1988	July 28, 1988	7.54%
July 29, 1988	August 25, 1988	7.95%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
July 3, 1985	July 9, 1985	7.70%
July 10, 1985	August 1, 1985	7.60%
August 2, 1985	August 29, 1985	8.18%
August 30, 1985	September 26, 1985	7.91%
September 27, 1985	October 24, 1985	7.87%
October 25, 1985	November 21, 1985	8.08%
November 22, 1985	November 26, 1985	8.08%
November 27, 1985	December 19, 1985	7.87%
December 20, 1985	January 16, 1986	7.57%
January 17, 1986	February 13, 1986	7.85%
February 14, 1986	March 13, 1986	7.71%
March 14, 1986	April 10, 1986	7.06%
April 11, 1986	May 8, 1986	6.31%
May 9, 1986	May 13, 1986	6.31%
May 14, 1986	June 5, 1986	6.56%
June 6, 1986	July 3, 1986	7.03%
July 4, 1986	July 8, 1986	7.03%
July 9, 1986	July 31, 1986	6.35%
August 1, 1986	August 28, 1986	6.18%
August 29, 1986	September 25, 1986	5.63%
September 26, 1986	October 23, 1986	5.79%
October 24, 1986	November 20, 1986	5.75%
November 21, 1986	December 18, 1986	5.77%
December 18, 1986	December 23, 1986	5.77%
December 24, 1986	January 15, 1987	5.93%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
November 25, 1983	December 22, 1983	9.93%
December 23, 1983	January 19, 1984	10.10%
January 20, 1984	February 16, 1984	9.87%
February 17, 1984	March 15, 1984	10.11%
March 16, 1984	April 12, 1984	10.60%
April 13, 1984	May 10, 1984	10.81%
May 11, 1984	May 15, 1984	10.81%
May 16, 1984	June 7, 1984	11.74%
June 8, 1984	July 5, 1984	12.08%
July 6, 1984	July 10, 1984	12.08%
July 11, 1984	August 2, 1984	12.17%
August 3, 1984	August 30, 1984	11.93%
August 31, 1984	September 27, 1984	11.98%
September 28, 1984	October 25, 1984	11.36%
October 26, 1984	November 21, 1984	10.33%
November 22, 1984	November 27, 1984	10.33%
November 28, 1984	December 20, 1984	9.50%
December 21, 1984	January 17, 1985	9.08%
January 18, 1985	February 14, 1985	9.09%
February 15, 1985	March 14, 1985	9.17%
March 15, 1985	April 11, 1985	10.08%
April 12, 1985	May 9, 1985	9.15%
May 10, 1985	May 14, 1985	9.15%
May 15, 1985	June 6, 1985	8.57%
June 7, 1985	July 3, 1985	7.70%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
October 1, 1982	October 28, 1982	10.41%
October 29	November 25	9.29%
November 26	December 23	9.07%
December 24, 1982	January 20, 1983	8.75%
January 21	February 17	8.65%
February 18	March 17	8.99%
March 18	April 14	9.16%
April 15	May 12	8.98%
May 13	June 9	8.72%
June 10	July 7	9.59%
July 8	August 4	10.25%
August 5	August 9	10.25%
August 10	September 1	10.74%
September 2	September 29	10.58%
September 30	October 27	9.98%

NEW RATES NOT COVERED ABOVE MAY BE OBTAINED BY TELEPHONING THE OFFICE OF ACCOUNTING SYSTEMS AND PLANNING, FTS 633-6276, FOR THE INFORMATION. ALTERNATIVELY, YOU MAY CALL THE TREASURY DEPARTMENT'S RECORDED MESSAGE REPORTING THE RESULTS OF THE MOST RECENT AUCTIONS OF 13, 26, AND 52-WEEK TREASURY BILLS. THAT RECORDING IS REACHED BY CALLING (202) 287-4100, IN THE BUREAU OF THE PUBLIC DEBT. THIS INFORMATION IS AVAILABLE BEGINNING THE DAY AFTER THE AUCTION.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

July 18, 1984

Mr. Roger A. Britt
Gray, Cary, Ames & Fry
525 H Street, Suite 2100
San Diego, California 97101

Dear Mr. Britt:

I am writing in response to your June 19, 1984, letter to Mr. Dewey Heising regarding the establishment of post-judgment interest rates on Federal judgments established by 28 U.S.C. §1961. Your letter was directed to me by Mr. Heising's office for reply.

You specifically requested a reconciliation of the difference between the issue/settlement dates cited by the Bureau of Public Debt and the beginning or ending dates of the interest intervals set by the Administrative Office.

The reason for the difference is relatively simple. The Administrative Office has consistently taken the position, since the implementation of 28 U.S.C. §1961, *as amended* by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, that the relevant interest rate is "settled" on the auction date, and that such interest rate is applicable to judgments entered on the next day following the auction, until the next interest rate is "settled." The common definition of the term "settle," as utilized by the Administrative Office, is in contradistinction to the technical definition, which involves the "settlement" of accepted tenders, on or before a date set by the Secretary of the Treasury. The "settlement date" in press releases of the Treasury Department is usually, but not always, the last day upon which payment for accepted bids at the auctions for T-bills can be made, and usually coincides with the issue date.

The Administrative Office sets the dates in question on the day following the auction for reasons of administrative necessity. The Treasury Department regulations provide (31 C.F.R. §349.8) that payment must accompany tenders, except for banks and recognized dealers. These entities have until the date specified in the offering to make settlement on their accepted tenders (31 C.F.R. §349.12, payment of accepted tenders). It also appears from the Treasury materials available (copies of Treasury offerings, instructions to bidders, statutes and the regulations) that the bills will be issued on a specific date, and that "settlement" must only be completed by that date (or another, different date specified in the offering circular). The only truly fixed dates appear to be those for the auction and those for the issuance.

Taking all of the facts into consideration, it is apparent that if the Administrative Office were to adopt a "settlement date" as the date on which the new rate would actually take effect, there would be serious and immediate questions as to the proper date. Would it be the date the cash payers pay up? Or, would it be the issue date? If one Federal Reserve Bank were to settle on a different date, would that change the effective date for the district in which it was located, or for all the districts in the large geographical area served by the Bank? Uniform administration of the statute requires that in order to serve the purpose of establishing a uniform national rate, there be one date, nationwide.

This interpretation of the statute is in accord with the common meaning of the term "settlement" (to agree, to approve, to ascertain, to determine, to establish, to fix), and renders the statute fair and sensible in its operation, in accordance with well-established rules of construction. *See* Sutherland, Statutory Construction, §47.31. In essence, we have chosen to interpret the statute in accordance with the ordinary meaning of the

word "settlement," as such renders the statute workable and provides uniformity.

I trust that this information is sufficient to resolve your dilemma.

Sincerely,

Timothy J. Greszko
Assistant General Counsel

cc: Mr. Heising

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

September 15, 1982

Mr. Edward H. Funston
Assistant Director, Executive Office
for United States Attorneys
Suite 803
1 Skyline Place
5205 Leesburg Pike
Falls Church, Virginia 22041

Dear Mr. Funston:

The question was recently raised with your office, as well as this office, as to the date upon which the interest rate on fifty-two week Treasury bills would be effective as to judgments filed in the district courts, under the provisions of section 302 of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164). The suggestion has been made that the wording of that section requires that the interest rate settled at the auction not be effective until a later "settlement" date. The operative wording of that section is as follows: (Emphasis added.) "[A]t a *rate* equal to the coupon issue yield equivalent . . . of the average accepted auction *price* for the last *auction* of fifty-two week United States Treasury bills *settled* immediately prior to the date of judgment."

It is my conclusion that the interest rate established at the auction takes effect with respect to judgments entered after the auction, not at some later time. It appears that the possibility of ambiguity arises from the use of the term "Settlement date" in press releases of the Treasury Department, which is usually, but not always, the last day upon which payment for accepted bids at the auctions for the T-bills can be made, and usually coincides with the issue date. (The most recent press release notes that settlement at the California Federal Reserve

Bank and branch will be September 10, rather than September 9, which is the issue date.)

The Treasury Department regulations provide (31 C.F.R. §349.8) that payment must accompany tenders, except for banks and recognized dealers. These entities have until the date specified in the offering to make settlement on their accepted tenders (31 C.F.R. §349.12, Payment of accepted tenders). It also appears from the Treasury materials available (copies of Treasury offerings, instructions to bidders, statutes and the regulations) that the bills will be issued on a specific date, and that "settlement" must only be completed by that date (or another, different date specified in the offering circular). The only truly fixed dates appear to be those for the auction and for the issuance.

Unfortunately, there is no legislative history on this aspect of the Act. The language used was a last-minute creation. Thus, we have had to look more to the meaning of the words than to a legislative intent. However, I consider it significant that in enacting this legislation Congress, which could have used the much more precise term "issued" did not do. Accordingly, the word "settled," should be understood in its common meaning. In the new language of §1961, its real antecedents are the words "rate" and "price" which are clearly "settled" at the auction. Payments then may occur on that day, for those who have tendered cash, or the equivalent, or within a specified time. It is only human nature that causes all those permitted to delay their payments to wait until the last possible day.

As pointed out in Black's Law Dictionary (5th Ed., 1979), the word "settle" is "A word of equivocal meaning; meaning different things in different connections, and the particular sense in which it is used may be explained by the context or the surrounding circumstances. Accordingly, the term may be employed as meaning to agree, to approve, to arrange, to ascertain, to

liquidate, to come to or reach an agreement, to determine, to establish, to fix, to free from uncertainty, to place, or to regulate.

Parties are said to *settle* an account when they go over its terms and ascertain and agree upon the balance due one from the other. And, when the party indebted pays such balance, he is also said to settle it." The Uniform Commercial Code, §4-104(j) defines settle to mean make payment. Even the most cursory examination of the definitions given under the heading of "Settle" or "Settlement" in the most recent edition of *Words and Phrases* indicates that it is simply not possible to fix an absolute meaning to that word. Not only does it have a variable legal meaning, but its common, technical, and commercial meanings all differ, depending upon the context. In such a circumstance, Sutherland, Statutory Construction, §47.31 notes that where different meanings exist, the common meaning will prevail until another is proven. In view of the slippery nature of the term "settled" in all of these categories, the language of section 302 must be construed in such a manner as to render the statute fair and sensible in its operation, in accordance with well-established rules of construction.[1]

If we were to adopt a "settlement date" as the date on which the new rate would take effect, there would be serious and immediate questions as to the proper date. Would it be the date the cash payers pay up? Or would it be the issue date? If one Federal Reserve Bank were to "settle" on a different date, would that change the effective date for the district in which it was located, or for all the districts in the large geographical area served by the Bank? Uniform administration of the statute requires that in order to serve the purpose of establishing a uniform national rate, there be one date, nationwide.

---

1. 82 C.J.S. §322(b)(3), §323, §326, and §329(d).

If we were to select the issue date as the proper effective date, the implications of having a delay in imposing the new rate on judgments must be considered. With as much as a week to consider the matter, parties would have an enormous incentive to file delaying motions if the resulting delay would be advantageous to their position. Also, judges and clerks of court would be subject to accusations of unfair or even corrupt dealing when issue dates and judgments were close in time. The disastrous results this could have on the administration of justice are obvious and cannot be overlooked.

At one time, under 12 C.F.R. §1204.104, banks were authorized to issue their certificates of deposit whose rates were tied to 26-week T-bill rates only on or after the "issue" dates. This gave investors and depositors two full business days under the old rates, during which they, of course, could decide to take advantage of that rate, or wait until the next rate took effect. Those regulations were changed so that the auction results are now effective on the following day for the purpose of determining the banks' rate. Rates for the All-Savers certificates take effect on the Monday after the auction, not on the subsequent Thursday. That feature has, we note, led to some savings institutions remaining open for extra hours to allow depositors to take advantage of the disappearing higher rate. Thus, it appears that there is no uniform practice of tying the effective date of an interest rate to the "issue date." Indeed, there are substantial reasons not to do so.

While, or course, our opinion on this question is subject to revision in a case before the courts, we shall be advising the judges and courts on the basis of the foregoing views. If the auction scheduled for September 30, 1982, is indeed held, the rate settled at that auction will apply to cases decided on and after October 1, 1982.

Sincerely,

Carl H. Imlay
General Counsel

bcc: Joe Torpey

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.
Appellants No. 8-1396

AMENDED ORDER

BEFORE: STAPLETON, SCIRICA, and COWEN,
Circuit Judges

The Court's Order filed February 13, 1989, is hereby amended and supplemented as follows:

The Court being of the view that the issue raised should be determined by the district court in the first instance, the Petition for Inclusion of Instructions in the Mandate is denied.

By the Court,

Circuit Judge

Dated: February 21, 1989

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1595

In The
Supreme Court of the United States
October Term, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HENRY T. REATH
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RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED BY PETITIONERS

Should this Court review an award of postjudgment interest in an antitrust case filed in 1974:

1. Where, the Court of Appeals awarded interest based on the unique facts of this case (including a 15-year history of litigation in which this Court has twice denied defendant-petitioners' petitions for certiorari) and petitioners' intentional predatory conduct, which destroyed Plaintiffs' small family business, and has been condemned by repeated findings of two juries in verdicts affirmed by the District Court and the Court of Appeals.

2. Where, because of the passage of time and paucity of cases, the Court of Appeals' decision will have no measurable precedential impact, since the only cases that might be affected are those where an initial judgment was secured before 10/1/82, and where, because of one or more appeals, no final decision by a court of appeals established a vested right to receive interest until after that date.

3. Where, because of remand by the court below to the District Court for calculation of the proper amount of postjudgment interest, the decision of the Court of Appeals is interlocutory and not a "final" decision.

4. Where the illusion of a division among the circuits, as contended, has been created by petitioners' inappropriate and misleading advocacy improperly linking two or more categories of cases together, and that illusion disappears when each case is correctly analyzed on its facts.

5. And where, the Court of Appeals:

(a) held that the Respondents (plaintiffs in the antitrust case) were entitled, based in part on the equities

and unique history of the case, to a larger amount of post-judgment interest than the District Court had awarded, but still denied Respondents the full amount of postjudgment interest requested;

(b) held that the legal theory espoused by petitioners was without legal support, had been previously rejected by the Court of Appeals in other cases, and in fact has been rejected by every other Court of Appeals ruling on the issue;

(c) applied the "manifest injustice" analysis from *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974), pursuant to the request and brief of petitioners, who now are contending, contrary to their position in the Court of Appeals, that the "manifest injustice" analysis does *not* apply; and

(d) applied this Court's unanimous ruling in *Bradley* in a manner consistent with rulings of the Second, Third, Fifth, Sixth, Eighth and Ninth Circuits, using the "manifest injustice" analysis which has been approved by each of these Circuits and has not been disapproved by any Circuit.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Respondents Joseph Bonjorno, Lorraine Kerr and Barbara Clisby state that they have no corporate affiliation other than formerly being owners and/or officers of the Columbia Metal Culvert Company, which ceased operations in 1977 due to the predatory activity of the Petitioners that is the subject of this lawsuit.

Following the death of George M. Kerr, Jr., Respondents petitioned the Court of Appeals to substitute Lorraine Kerr, Executrix of the Will of George M. Kerr, Jr., as a party. That petition was granted on March 29, 1989.

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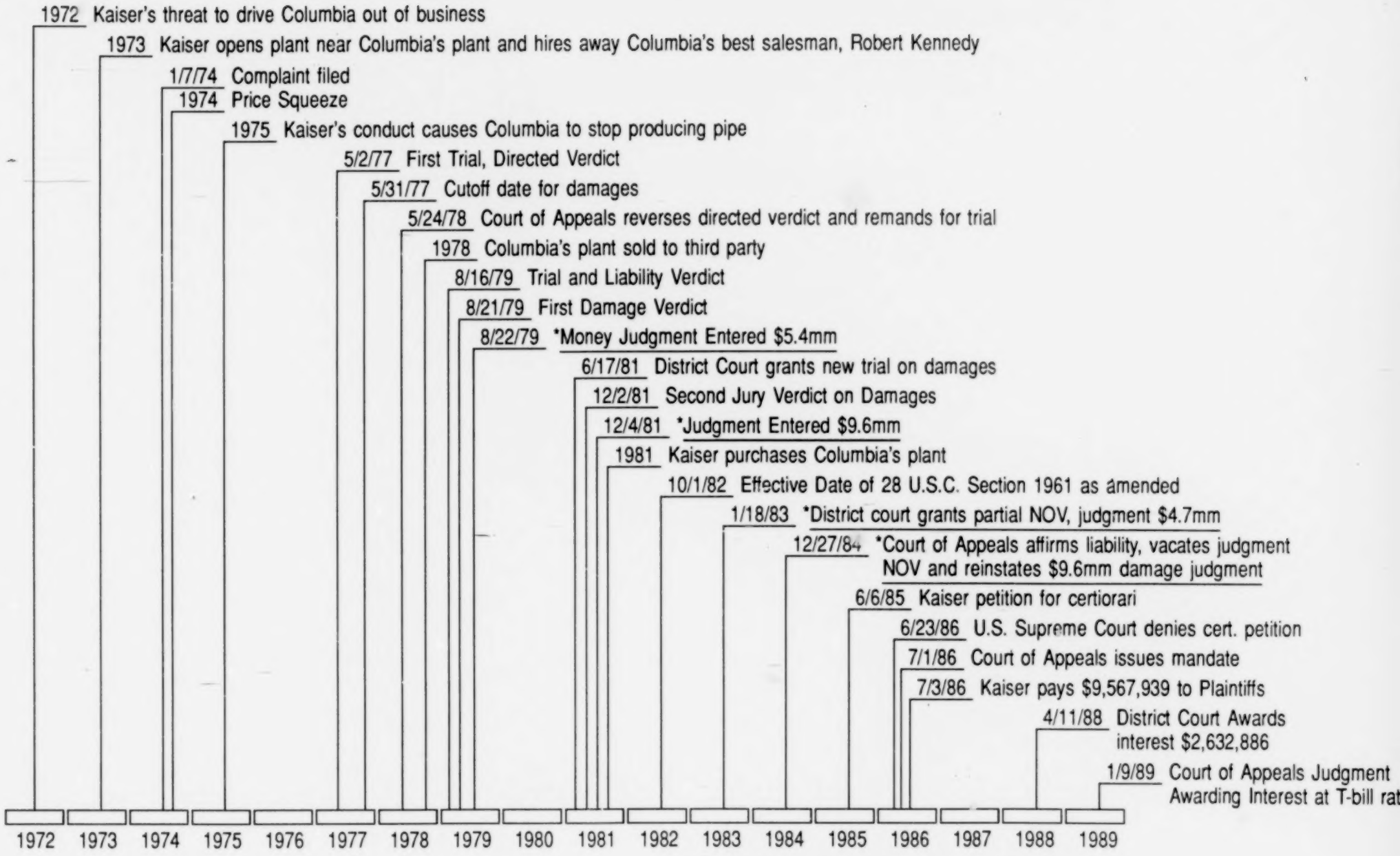
BONJORNO TIME LINE



*denotes the various "judgments" entered in this case

OPINIONS BELOW

This case had its genesis in an antitrust Complaint filed in January 1974 to recover treble damages for predatory acts by a giant monopolist, beginning more than 15 years ago, which ultimately destroyed Plaintiffs' small family business, resulting in a 1981 judgment of approximately $9.5 million.[1]

The Judgment and Opinion of the Court of Appeals of January 9, 1989 (which awarded to Plaintiffs' federally prescribed interest), reported at 865 F.2d 566, are reproduced in Petitioner's Appendix (Pet. A-) at A-1 and A-3, respectively. The Opinion of the United States District Court for the Eastern District of Pennsylvania is reproduced at Pet. A-31.

The Opinion of the Court of Appeals on the merits of the antitrust claim, dated December 27, 1984, is reported at 752 F.2d 802 (*cert. denied*, 477 U.S. 908 (1986)), and the Opinions of the District Court on the merits are reported at 518 F. Supp. 102 (1981) and 559 F. Supp. 922 (1983).

The Opinion of the Court of Appeals in a earlier appeal decided on May 24, 1978, is reported at 579 F.2d 20 (*cert. denied*, 439 U.S. 876 (1978)).

JURISDICTION

The judgment of the Court of Appeals on postjudgment interest was entered on January 9, 1989. Cross-petitions for rehearing and rehearing *in banc* were denied by Order dated February 13, 1989. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical

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[1] Attached in the Appendix to Respondents' Cross-Petition which is being filed at the same time as this Brief (Cross-Pet. A-) A-1, and reproduced for the convenience of the Court on the opposite page, is a document entitled "Bonjorno Time Line," which succinctly identifies the principal opinions and events in the extraordinary history of this complex and protracted case.

Sales, Inc. ("Kaiser") filed and served its Petition for a Writ of Certiorari on March 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondents Joseph Bonjorno, Lorraine Kerr, and Barbara Clisby ("Plaintiffs") submit that although this Court has jurisdiction, this Court should not grant certiorari because a major issue remains to be resolved before the District Court, as to the applicable rate of interest in the present case. The Court of Appeals, by Order dated February 21, 1989 (Pet. A-74), directed that the District Court consider that issue in the first instance. See Pet. at 22-23 n.9, and discussion below at 11-12.

—o—

STATUTES INVOLVED

The interest award in this case involves interpretation of 28 U.S.C. § 1961, as amended effective October 1, 1982, which provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

This case also involves application of the second sentence of Federal Rule of Appellate Procedure 37, titled

"Interest on Judgments." The Rule in its entirety provides:

> Unless otherwise provided by law, if a judgment for a money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

I. PRELIMINARY STATEMENT

The real issue presented in this dispute over interest is an attempt by a predatory monopolist to reap the benefits of its monopoly *and* retain the benefits of 10 years worth of interest (which benefit it obtained by delayed payment on a multimillion-dollar judgment); while, at the same time, denying to the innocent and injured Plaintiffs an award of interest equal to the benefits Kaiser received—an award which is required to fully preserve their judgment against diminution due to loss of the time value of money.

Kaiser seeks this unconscionable result by contending that Plaintiffs' interest should only accrue under a law repealed over six years ago at 6% simple interest, with no compounding, over a time period when interest rates in the private market peaked at prime rates over 20%. During this same period, Plaintiffs, due to Kaiser's conduct, were forced to borrow money at three percentage points *above* the prime rate.

Petitioners, in urging this court to grant certiorari, have attempted to create, in two respects, the illusion of conflicts among the circuits, that as we demonstrate below in this brief do not exist:

First, as we point out in Section III(8) pp. 24-26, Petitioners have lumped together in their "retroactive analysis", (Pet. at 14-22) two distinct classes of cases (1) statutory changes affecting vested substantive property rights vs. (2) remedial or procedural changes affecting rights

still in limbo. When these cases are restored to the categories where they belong, there is no conflict.

Second: In their discussion of this Court's "manifest injustice" analysis (*Bradley v. School Board of Richmond*, 416 U.S. 696 (1974)), Petitioners fail to recognize that because of the very nature of such factual analysis, each case may be decided differently because the facts are different. (See discussion below in III(5) pp. 17-19)

The Federal Interest Statute

More than six years ago, in 1982, Congress amended the federal interest statute, 28 U.S.C. § 1961, (which provided for interest on federal district court judgments to be awarded under state law) specifically to prevent the inequity that Kaiser requests this Court to perpetuate. (*I.e.*, awarding interest for federal antitrust violations under Pennsylvania law at 6% simple interest).

Public Policy Requires Adequate Interest

Because Kaiser's intentional predatory conduct in destroying Plaintiffs' family business is the most egregious and reprehensible type of conduct prohibited by the antitrust laws, public policy requires that adequate interest be awarded to prevent Kaiser from diminishing the treble damage award against it by profiting from its delay in payment. By arguing for an inadequate rate of post-judgment interest, Kaiser seeks to turn a profit out of its reprehensible conduct by paying the entire treble damage judgment ($9.5 million) out of the benefits (some $17 million) it gained from use of Plaintiffs' money.

Here, the delays in payment were occasioned by Kaiser's numerous post-trial motions and appeals which it ultimately lost. Kaiser's inequitable contentions are advanced, notwithstanding the condemnation of Kaiser's conduct by the jury and the Courts.

Non-recurring Issue & No Fundamental Unfairness

The issues presented by Kaiser are unique. Contrary to Kaiser's flawed analysis (see Pet. at 13), they are in

fact nonrecurring. They do not concern any ongoing issues of judicial administration. (See Section III(3) below pp. 13-15). Kaiser cannot, and has not attempted to point to any fundamental unfairness in the decision of the Court of Appeals: a decision which merely gave proper effect to the intent of Congress to override inadequate state law rates of interest such as Pennsylvania's 6% rate which is the lowest in the nation.[2] Kaiser has stubbornly litigated and relitigated every conceivable issue in this case and continues to delay full payment of its liability through further litigation. Kaiser should expect to pay a reasonable rate of interest over this period of delay.

Bradley v. School Board of Richmond *Controls*

The Court of Appeals reached the proper result on the applicable law under its careful analysis of the "manifest injustice" factors set forth by Mr. Justice Blackmun for a unanimous Court (with two abstentions)in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). Although Kaiser contended below that *Bradley* provided the proper framework for analyzing the issues, it now attempts to disavow that position to this Court (see Section III(2)(a) below pp. 12-13). The circuits are uniformly in agreement on the applicability of the *Bradley* manifest injustice analysis in the handful of similar cases interpreting the applicability of amended 28 U.S.C. § 1961 to pending cases.

No Division Among Circuits On Equity Of Statute And Discretion To Set Date For Commencement Of Interest

This Court denied certiorari last term in *Chattem, Inc. v. Bailey*, 108 S. Ct. 2831 (1988) (with Mr. Justice White dissenting). Analysis of recent cases demonstrates there is no division among the circuits on this issue. *See e.g., Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988). (See also Section III(9) below pp. 27-

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[2] Comment, *The Postjudgment Interest Rate In Pennsylvania: Ignoring Reality For Too Long*, 23 DUQ. L. REV. 1083 (1985).

29). The district court and the Court of Appeals (which was unanimous on this issue) did not exceed their authority in determining that interest should begin to run as of at least December 2, 1981—the date of the verdict recalculating damages. Indeed, as we demonstrate in Plaintiffs' Cross-Petition for Certiorari filed concurrently with this Brief, they erred by unduly *shortening* the time period over which interest should run by some two and one-half years.

Plaintiffs' Conditional Cross-Petition

Plaintiffs in their Cross-Petition request that if this Court grants certiorari (which Plaintiffs vigorously oppose) this Court should reaffirm the power of the federal Courts of Appeals to fashion equitable remedies, to do justice between the parties and provide for payment of interest (under Fed. R. App. P. 37 and 28 U.S.C. § 1912) at full market rates in exceptional cases such as the present one;—rather than award Treasury bill rates, as authorized by 28 U.S.C. § 1961, as amended, which are typically two to three points below prime and thus do not adequately preserve the value of the judgment against diminution due to loss of the time value of money.

The reasons why Plaintiffs conditionally seek certiorari are summarized below:

¶ Kaiser (which the jury found to have intentionally and willfully monopolized the market for fabricated aluminum culvert pipe) engaged in systematic predatory conduct which destroyed Plaintiffs' family business.

¶ By delaying its ultimate day of reckoning in having to pay its full liability on the judgment, Kaiser, the predatory monopolist, has reaped the benefits of delay, according to market rates, in an amount in excess of $17 million.

¶ Similarly, during this same period, the Plaintiffs (who were not awarded any prejudgment interest and whose damages were measured in 1977 dollars) were deprived of the full value of the

benefit of their judgment of liability from August 1979 to date by a similar amount—i.e., in excess of $17 million.

¶ The Court should not allow the foregoing inequity go unremedied.

Respondents' (Plaintiffs') Willingness To Accept Court Of Appeals Decision

Notwithstanding their desire to see full justice done, and to carry out the policy of the federal antitrust laws, the Plaintiffs, after more than 15 years of hard-fought litigation and great expense wish to put to an end this seemingly endless dispute so they can receive *now*[3] the interest awarded them below, and get on with their businesses and their lives. Thus Plaintiffs are willing to accept the Court of Appeals' decision if they can promptly and without further litigation and delay, partially enjoy the benefits to which a jury of their peers determined they were entitled—albeit their award of interest is significantly reduced, both as to time period and the total amount of interest awarded.

This Is a Fact-Bound Case Controlled by Bradley

Finally, although several Courts of Appeals have considered issues similar to those presented in the present case, and have reached varying results on the facts of those cases, there is no substantial conflict among the circuits.

All of the Courts of Appeals that have considered the issues, have analyzed them under the factors set forth by this Court in *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974). (See Section III(4) below pp. 16-17).

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[3] Kaiser is now disputing Plaintiffs' contention as to the proper date of the treasury bill auction that fixes the proper rate of interest. Pet. at 22-23 n.9. As noted at pp. 11-12 of this Brief, this issue has been remanded by the Court of Appeals for decision by the District Court.

Thus, Kaiser could still appeal the final judgment of the District Court to the Court of Appeals and seek certiorari from this Court, thereby further delaying for two or more years Plaintiffs' ultimate recovery of interest.

Bradley sets forth a three-pronged test for determining *manifest injustice* which depends upon the facts of the specific case and the nature of the parties and their rights. The differing results that have been reached by different Courts of Appeals are based upon the differing facts presented to them. Plaintiffs, however, submit that no Court of Appeals would reach a different result than that reached by the Third Circuit on the issue of the applicable law, given the circumstances presented in this case, including:

(1) the vesting of Plaintiffs' right to receive interest after the effective date of the 1982 amendment to the statute;

(2) the wholly inadequate 6% simple interest rate provided under Pennsylvania state law as compared with market interest rates peaking over 20% and the intent of Congress to override such inadequate rates of interest;

(3) Plaintiffs' repeated requests to obtain prompt payment of the judgment including mandamus petitions requesting the Court of Appeals to speed up the decision of the District Court on post-trial motions and requests for lifting the stay of issuance of the mandate to force payment of the judgment; and

(4) finally, but most important, Kaiser's intentional predatory monopolistic conduct and calculated destruction of Plaintiffs' small family business.

For the reasons developed more fully below, Plaintiffs respectfully request that this Court deny Kaiser's Petition for Certiorari.

II. COUNTERSTATEMENT OF THE CASE

A. Kaiser's Predatory Destruction of Plaintiffs' Business And Monopolization Of The Market For Fabricated Aluminum Culvert Pipe

On the merits of the underlying dispute, Kaiser, a large international corporation, was found liable for deliberately destroying Columbia Metal Culvert Co., Inc., Plaintiffs' relatively small competing business. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *see also Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

For a more complete counterstatement of the case, see the statement in Plaintiffs' Cross-Petition, which is incorporated here in its entirety by reference.

B. Kaiser Has Obtained The Benefits Of Delay, And The Value Of Plaintiffs' Judgment Has Been Severely Diminished Due To Loss Of The Time Value Of Money

Plaintiffs' antitrust damages were measured as of May 31, 1977. Interest on $9,567,939 from August 1979 through June 13, 1988 (when Plaintiffs' brief was filed with the Court of Appeals) after accounting for Kaiser's payment of $9,567,939 as of July 3, 1986 is in excess of $17 million, when measured at monthly average prime rates, compounded monthly. Interest continues to accrue at a rate of approximately $4,250 per day. Kaiser, as a predatory monopolist, should not be permitted to retain, at Plaintiffs' expense, the windfall benefits it received by delaying payment of the judgment. Awarding Plaintiffs Treasury bill interest under 28 U.S.C. § 1961 as amended, as directed by the Court below, will help diminish Kaiser's windfall, and will also help preserve for Plaintiffs—although not fully—the jury's award.

C. The Judgment Of The Court Of Appeals

In determining the appropriate interest on Plaintiffs' judgment on the merits, the Court of Appeals:

(1) rejected Kaiser's contention that interest should only run from the date of issuance of the Court of Appeals mandate on July 1, 1986, (which reinstated the jury's December 2, 1981 damage award);

(2) rejected, without comment, Kaiser's contention that postjudgment interest should accrue only on pre-trebled damages, rather than the amount of the judgment;

(3) denied Plaintiffs' request that interest be calculated at monthly average prime rates, compounded monthly, from August 1979, (which would have resulted in an award of interest in excess of $17 million);

(4) denied Plaintiffs' request that interest should date back to August 1979, when the original verdicts and judgment were entered, and instead held that interest should begin to run as of December 2, 1981, the date of the verdict on the retrial on damages;

(5) held that, on the narrow facts of this case, application of current law, which has now been in effect for over six years, does not result in manifest injustice, and therefore the amount of interest due and owing to the Plaintiffs is determined by the current version of 28 U.S.C. § 1961 (federal T-bill rate), rather than the version repealed by Congress in 1982 (state law rates).

The Court of Appeals carefully examined Kaiser's contention, based upon Kaiser's reliance on the applicability of the rule set forth in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), that the application of current law would result in manifest injustice.[4] In analyzing the factors set forth in *Bradley*, the Court of Appeals correctly concluded, based on the special facts of this case,

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[4] Kaiser sought to apply the repealed version of 28 U.S.C. § 1961, in an attempt to obtain an unrealistic rate of postjudgment interest of 6%, also contending contrary to 28 U.S.C. § 1961(b) that there should be no compounding of interest. In 1982, Congress amended 28 U.S.C. § 1961, specifically to prevent the type of result Kaiser contends should be reached in the present case: long delay, and serious diminution in the value of a judgment due to loss in the time value of money, based on inadequate state law rates of interest.

that application of current law would not result in manifest injustice:

> In view of the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in the law on their rights, we conclude that application of the T-bill rate to the entire period does not result in manifest injustice.

865 F.2d at 576, Pet. A-23.

As discussed below, the Court of Appeals conclusion of no manifest injustice was fair and just as between the parties, and consistent with longstanding precedent in this Court, as well as precedent in other Courts of Appeals. There is no reason to grant certiorari in this case.

III. REASONS FOR DENYING KAISER'S PETITION

1. The Court Should Not Grant Kaiser's Petition Because No Final Judgment Has Been Entered On Plaintiffs' Interest Award

Although this Court has jurisdiction to review interlocutory judgments of federal courts of appeals, the Court has properly established a general rule of refraining from issuing a writ of certiorari where a judgment is not final. As Kaiser notes in its Petition at 22-23, n.9, the Court of Appeals has remanded a major issue to the district court to determine before the amount of interest due can be calculated.

Accordingly, the judgment of the Court of Appeals is not a final judgment, and the Court should not issue a writ of certiorari to review that interlocutory judgment.[5]

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[5] In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916), this Court stated:

> except in extraordinary cases, the writ is not issued until final decree [citations omitted]. The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.

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Since Kaiser's Petition for certiorari is premature, it should be denied.

2. Kaiser Failed To Raise The Arguments Presented On Its Petition Before The Court Of Appeals. It Is Thus Barred From Presenting Those Arguments Now

a. Kaiser Is Precluded From Arguing Against The Applicability Of *Bradley* By Its Reliance On *Bradley* In The Court Below

Kaiser's principal argument below was that "the District Court *correctly* applied . . . *Bradley v. School Board*, 416 U.S. 696 (1974)." (Kaiser's Appellate Brief at 22 (emphasis added)). Yet Kaiser contended for the first time in its petition for rehearing in the Third Circuit, and now contends before this Court, that the analysis set forth in *Bradley* does *not* apply to this case. Pet. at 14.

Kaiser's new argument is foreclosed by its failure to raise those contentions below.[6] Moreover, Kaiser's sudden change of position on the applicability of *Bradley* in the face of the careful and correct analysis of the *Bradley* factors by the Court of Appeals vividly demonstrates the lack of any logical consistency in the positions advocated by Kaiser.[7] Kaiser has argued all along that *Bradley* pro-

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In *Brotherhood of Locomotive Firemen & Engineermen v. Bangor & Aroostook R. Co.*, 389 U.S. 327 (1967), this Court vacated an order granting certiorari in a case in which the Court of Appeals had ruled on some legal issues, but remanded the case to the District Court to consider a significant remaining issue. This Court concluded that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328.

6 *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (issue first raised in response to motion for reconsideration in Court of Appeals was precluded from consideration by this Court); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

7 Kaiser contends that interest should not begin to run until July 1, 1986 (nearly four years after the effective date of

(Continued on following page)

vides the proper framework for decision, and it is bound by those arguments.

b. Kaiser Is Precluded From Arguing Against The Running Of Interest From The Date Of The Verdict By Its Failure To Raise This Issue Below

Kaiser again reverses its field when it now argues to this Court, contrary to its brief below,[8] that the proper date to start the running of interest was December 4, 1981, the date the District Court entered a judgment on the jury verdict.[9]

3. Kaiser's "Flood-Gate" Argument Regarding The Number Of Outstanding Judgments That Could Be Affected If This Court Does Not Reverse The Decision Below Is Utterly Unfounded And Wrong.—To The Contrary, Review By This Court Will Have No Measurable Impact Because There Are Few, If Any, Pre-October 1, 1982 Judgments Still In The Appeals Pipeline

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the amendment), yet at the same time it contends that interest should run at a rate provided by the version of 28 U.S.C. § 1961 repealed in 1982. (Pennsylvania's 6% simple rate). There is no way to reconcile these positions.

Kaiser also contended below that the two days of interest it believed were appropriate should be calculated under the *amended* statute at T-bill rates, thus *admitting* the applicability of current law to the interest due on the Court of Appeals' judgment.

8 Kaiser argued to the Court of Appeals that interest should run either from July 1, 1986, the date the judgment became final following Kaiser's appeals, or from December 2, 1981, the date the jury verdict was rendered. 865 F.2d at 570, Pet. A-11.

9 Kaiser's only motivation for its belated challenge of these two days of interest is an attempt to lock in to a lower T-bill rate and deny Plaintiffs approximately one-third of their interest (some $4 million).

The Court of Appeals has remanded the issue of the proper T-bill rate to the District Court and that issue is not ripe for this Court. See Kaiser Pet. at 22-23 n.9.

Kaiser's Certiorari Petition misleadingly warns of widespread and dire consequences resulting from the decision of the Court of Appeals unless reversed by this Court. However, its data is wrong and its conclusions are completely unfounded.

Kaiser wrongly claims that there are thousands of judgments, worth hundreds of millions of dollars, that will be affected by the Court of Appeals' narrow holding. Pet. at 13. Kaiser suggests that judgment creditors for any judgment predating October 1, 1982 that is still listed as unsatisfied in records of the Clerk of the Eastern District of Pennsylvania could come back to Court and demand interest based on the T-bill rates from the time of judgment. That contention is meritless and founded on Kaiser's desperate search for a much broader class of cases than covered by the decision below.

Kaiser would include in its count all cases in which the judgment has not yet been collected or reported to the District Court as satisfied. But, as this Court made clear in *Bradley*, its analysis applies *only* to cases *currently pending before the courts*, 416 U.S. at 711. Thus, the only cases that could be affected by the opinion of the Court of Appeals in this case are cases within the Third Circuit in which (1) a money judgment was entered prior to October 1, 1982 (the effective date of the amendment), and (2) the case is still pending on direct review.[10] That category of cases potentially affected by this case is infinitesimal and is quickly disappearing.[11] Indeed, it is doubtful that there are or will be any pre-October 1, 1982 cases, other than this case, still pending at all in the Third Circuit by the time this Court could render any opinion on this issue.

There have been a handful of cases interpreting the application of amended § 1961 to cases pending as of its October 1, 1982 effective date. Now that almost seven years have elapsed since the effective date of the amendment, this issue has already been resolved for most if not all other cases pending in 1982 in which a judgment had been entered prior to October 1, 1982. There is no reason to grant certiorari in the present case, which may very well be the last case still pending.[12]

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10 See *Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987).

11 Plaintiffs' counsel's review of cases predating October 1, 1982 that are still listed as "open" by District Court records reveals only five cases in the Eastern District of Pennsylvania still "open" in which a money judgment was entered prior to the amendment to section 1961. A review of the dockets of these five cases suggests that there are no open issues and that they have been reduced to final controlling judgments or settled.

Moreover, there are a host of errors in Kaiser's data:

(1) The list from which Kaiser derived its statistics, is *not* a list of open cases, but rather is a list of judgment debtors, and it contains many duplicative entries.

(2) Judgments entered against more than one defendant are listed separately for each defendant. (For example, business name and owner's name, multiple separate businesses, parent and subsidiary business' names).

(3) Judgment liens that are revived are listed as separate judgments.

(4) Finally inevitable errors and duplication exist in the list.

None of these factors can be accurately assessed unless the list of judgment debtors is generated by docket number, however, the judgment debtor list is only available from the District Court Clerk's Office in alphabetical order of judgment debtors.

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12 *Cf.* Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959); R.L. Stern, E. Gressman, S.M. Shapiro, *Supreme Court Practice*, § 4.4 at 200 ("If the statute upon which the controversy rests has expired or been amended in a manner which will prevent the problem from arising in the future, certiorari may be denied . . . .") (BNA 6th Ed. 1986); Stern, *Denial*

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4. The Circuits Are In Agreement That *Bradley's* Manifest Injustice Analysis Governs The Application Of Amended 28 U.S.C. § 1961 To Pending Cases

Contrary to Kaiser's suggestion of any conflict or confusion, all of the Circuit Courts that have analyzed the applicability of the amendment to § 1961 to pending cases have utilized the *Bradley* manifest injustice analysis.[13] Accordingly, there is no conflict whatsoever as to the proper framework for determining whether amended 28 U.S.C. § 1961 should apply in pending cases.

In *Bradley v. School Board of Richmond,* 416 U.S. 696 (1974), a unanimous[14] Court, per Mr. Justice Blackmun, reiterated the principle that for cases pending on direct review, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manfiest injustice or there is statutory direction or leg-

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of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 (1953) (where a conflict among courts is eliminated by amending the statute, there is no reason to grant certiorari to resolve the conflict).

13 *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 865 F.2d 566, 572-76 (3d Cir. 1989); *Bailey v. Chattem, Inc.*, 838 F.2d 149, 155 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Campbell v. United States*, 809 F.2d 563, 569-76 (9th Cir. 1987); *Brooks v. United States*, 757 F.2d 734, 741-43 (5th Cir. 1985); *Litton Systems, Inc. v. AT&T*, 746 F.2d 168, 172-76 (2d Cir. 1984). In addition, *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), cites the discussion in *The Schooner Peggy* of the "manifest injustice" factors.

Two other Courts of Appeals have referred to the issue in dicta or considered the issue in a per curiam opinion without any analysis, and have not specifically referred to *Bradley* or *The Schooner Peggy*. *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943, 944 (7th Cir. 1984) (per curiam); *United States v. Dollar Rent-A-Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983) (dicta in footnote).

14 Justices Marshall and Powell took no part in the consideration of the case.

islative history to the contrary." 416 U.S. at 711. Mr. Justice Blackmun went on to identify, as the focus of the analysis of whether there is manifest injustice:

> (a) the nature and identity of the parties;
>
> (b) the nature of their rights; and
>
> (c) the nature of the impact of the change in law upon those rights.

Id. at 717 (citing *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801)).

5. Fact Bound Issues: Any Differences In Result In Applying Amended § 1961 To Pending Cases Is Due To The Different Facts In Each Case Analyzed For Manifest Injustice

Kaiser wrongly argues in its Petition that the decision of the Court of Appeals "directly conflicts" with *Litton Systems, Inc. v. AT& T,* 746 F.2d 168 (2d Cir. 1984); *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985); *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984) (per curiam); and *United States v. Dollar Rent-A-Car,* 712 F.2d 938 (4th Cir. 1983) (dicta).[15] Pet. at 9. However, Kaiser's argument ignores the fact-based nature of the *Bradley* manifest injustice analysis.

The illusory "conflict" among circuits is nothing more than a good example of how the discretionary "manifest injustice" analysis properly gives the Courts flexibility in determining this issue on the facts and equities of the individual cases presented. The *Bradley* analysis is intended to examine the specific facts of each case to deter-

15 *Dollar Rent-A-Car* presents only dicta and *Merit Insurance* did not give more than a one sentence analysis. Moreover, the Fifth Circuit rule of *Brooks* has been modified to provide that the amended version of § 1961 applies for interest running after any judgments subsequent to October 1, 1982 in a given case. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613 (5th Cir. 1988), *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111, 1113 (5th Cir. 1985). Therefore only *Litton* presents any real possibility of substantive conflict, and it is distinguishable on its facts.

mine if "manifest injustice" would result from applying the law in effect at the time a decision is rendered. Given the factual nature of the inquiry, and the goal of ensuring justice between the parties, varying *results* are hardly surprising under *Bradley*. Furthermore, the *results* from applying *Bradley* are limited in precedential value by the facts and equities of each case.

Kaiser, relying heavily on the Second Circuit's decision in *Litton v. AT&T*, attempts to create a conflict, and makes the incredible assertion that *Litton* and *Bonjorno* involve "virtually identical facts." Pet. at 10. Although both *Litton* and *Bonjorno* are private antitrust actions, the factual similarities end at that point:

The *Litton* case involved a vastly larger award of $276 million to which the parties *had stipulated* the applicable state interest rate of 9% thus justifying the defendants' reliance that its interest liability was fixed. 746 F.2d at 170. Constrast this with Kaiser's situation, in which Kaiser had no justification to rely on the fact that the inordinately low Pennsylvania 6% simple interest rate might not be changed at any minute.[16] Furthermore, Kaiser in the court below, did not offer a scintilla of evidence to show any reliance to its detriment or other prejudice.

Bonjorno, unlike *Litton*, involved no stipulation on interest rates. Plaintiffs in *Bonjorno*, unlike *Litton*, timely petitioned for inclusion of instructions in the Court of Appeals' mandate on interest. Moreover, *Bonjorno* involves vicious predatory conduct which is a classic treble damage case, in contrast to *Litton* which involved an attempted monopolization claim based on a tariff filed by defendant with the F.C.C.—conduct at least arguably protected by the *Noerr-Pennington* doctrine. *See Litton Systems, Inc.*

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[16] *See Campbell v. United States*, 809 F.2d 563, 575-76 & n.9 (9th Cir. 1987) (distinguishing *Litton* on basis of stipulation); *cf. Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.), *cert. denied*, 109 S.Ct. 273 (1988) (defendant had no right to rely on 8% legal rate of interest as of 1975); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

v. AT&T, 700 F.2d 785, 806-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

Almost ten years have elapsed since the entry of the original judgment in favor of Plaintiffs and the measurement of damages as of May 31, 1977. The failure to award adequate interest will severely diminish the value of Plaintiffs' judgment.[17] The 6% simple interest that would be applied under the old § 1961 would produce a grossly inadequate and inequitable result, rewarding the predatory monopolist for its delay in paying the judgment—and thereby encourage others to profit from stretching out litigation by multiple appeals.

Moreover, differing views on legislative history may also be case-specific.[18] For example, a federal court in Pennsylvania might view failure to apply current law as inconsistent with congressional intent to override Pennsylvania's inadequate 6% rate, while a Court in a state with a state postjudgment interest rate of 18% might view the situation in a different light.

6. The Third Circuit Reached The Correct Conclusion In Its Application Of *Bradley*.—Its Narrow Fact-Specific Holding Is Not Inconsistent With The Decision Of Any Other Circuit

Under *Bradley* current law should be applied to pending cases unless it would result in "manifest injustice" or there is "statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711. *See Bonjorno*, 865

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[17] Prevention of such diminution of the value of the damage award was precisely the reason for the amendment, *see* S. Rep. No. 275, 97th Congress, 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21. This concern was specifically addressed by the Court of Appeals below. *See* 865 F.2d at 574.

[18] *Compare Campbell*, 809 F.2d at 566 (discussing purposes of the change in applicable interest rate), *with Litton*, 746 F.2d at 170, 174-75 (no discussion of purposes of 1982 amendment).

F.2d at 573; *Campbell,* 809 F.2d at 572; *Litton,* 746 F.2d at 174.

As a practical matter, it is clear that there is no "manifest injustice" in requiring an adjudicated antitrust predator to pay an interest rate that more adequately accounts for the time value of money. Moreover, the legislative history clearly establishes congressional intent to override inadequate state law rates of interest, precisely to prevent the inequitable result of inadequate interest for which Kaiser contends.[19] Moreover, comparison of this case to *Bradley* and analysis of the three-pronged test for "manifest injustice" in *Bradley* vividly demonstrate that the Court of Appeals reached the correct result.[20]

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[19] On the legislative history, the Court of Appeals correctly noted that there was very "scant indication" to bear on any of these issues. The Third Circuit in *Bonjorno* agreed for the most part with the analysis of the legislative history set forth by the Ninth Circuit in *Campbell v. United States,* 809 F.2d 563 (9th Cir. 1987).

Although the Second Circuit in *Litton Systems, Inc. v. AT&T* 746 F.2d 168 (2d Cir. 1984) reached a different interpretation of the legislative history, its analysis was result oriented, and the Court clearly reached the conclusion it believed was appropriate on the facts of the case presented to it which, as noted above, differ starkly from the facts of the present case. Given the scant legislative history, these result-oriented interpretations of the legislative history are not surprising. The one matter that is well established in the legislative history, however, is that Congress intended to override state law rates of interest that provided inadequate interest to carry out the policy behind the federal interest statute to preserve the value of the judgment against diminution due to loss of the time value of money. *See supra* note 17.

[20] Mr. Justice Blackmun in *Bradley,* writing for a unanimous court, cautioned that the question before the Court in *Bradley,* regarding the propriety of a fee award covering payment for services rendered prior to enactment of the statutory fee provision was "not simply one relating to the propriety of retroactive application of Section 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation *where the propriety of a fee award was pending resolution* on appeal when the statute became law." 416 U.S. at 710

(Continued on following page)

The three elements of the *Bradley* manifest injustice analysis compel the result reached by the Court of Appeals in the present case:

Nature And Identity Of The Parties

The *first factor,* the nature and identity of the parties, is principally concerned with distinguishing purely private disputes from cases that implicate broader national concerns. *See Bradley,* 416 U.S. at 717 (citing *Schooner Peggy,* 5 U.S. (1 Cranch) at 110). In finding that national interests are implicated by awarding adequate interest to the Plaintiff, the Court of Appeals below correctly recognized Plaintiffs' role as private attorneys general, furthering public policy by making Kaiser accountable for its intentional predatory destruction of a small competitior to preserve its monopoly.[21] The Court of Appeals observed that "the congressional mandate that plaintiffs who prevail in [antitrust actions] be awarded treble damages should not be diminished by insufficient postjudgment interest." 865 F. 2d at 575.

Nature Of Their Rights

The *second manifest injustice factor* focuses on the nature of the parties' rights involved in the case. This factor, according to *Bradley,* seeks to avoid the application of new law where it would deprive or infringe upon *vested* or unconditional rights. *Bradley,* 416 U.S. at 720. In this case, the Court of Appeals correctly noted that there is

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(emphasis added). *See* 865 F.2d at 573 n.14; Pet. A-17 n.15. Similarly, in the present case, the issue is not simply whether § 1961, as amended, applies to interest that runs over a period prior to the enactment of the amendment, but is a question of the applicability of amended § 1961 to a case pending resolution when the amendment became effective.

[21] *Bonjorno,* 865 F.2d at 575 (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 634-35 (1985)); *cf. Bradley,* 416 U.S. at 719 (noting private attorney general concept in civil rights enforcement created public interest in attorney fee statute at issue) (quoting *Newman v. Piggy Park Enterprises, Inc.,* 390 U.S. 400, 401-02 (1968)).

no vested or unconditional right to any given rate of interest on a damage award that is not itself final. 865 F.2d at 575. This conclusion follows from well settled law that there is no vested right to receive any particular rate of postjudgment interest *even after* a final controlling judgment is entered. *See Morley v. Lake Shore & Michigan Southern R. Co.*, 146 U.S. 182 (1892), and other decisions of this Court discussed in Section 7, that follows.

Nature Of Impact Of Change In Law Upon Rights

Finally, *the third factor* in the analysis for manifest injustice considers the impact of the change in law upon the rights of the parties. The inquiry here is whether the change imposes new and unanticipated obligations that would have caused the party to change the conduct that led to the lawsuit. *Bradley*, 416 U.S. at 720. In *Bradley*, the Court noted that clarification of the right to a fee award had no bearing on the underlying violation of civil rights by defendants. 416 U.S. at 720-21 ("there was no change in the substantive obligations of the parties"). Similarly, refinements in the interest rate on judgments have no bearing on Kaiser's substantive violation of the antitrust law.[22] The Court of Appeals correctly recognized that a change in the rate of interest charged on judgments for trebled antitrust damages is neither a new nor an unforeseeable obligation. *Bonjorno*, 865 F.2d at 575-76.

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[22] The *Litton* court concluded that if the defendant had known of or anticipated the new interest rate it "might have" altered its conduct. 476 F.2d at 176. However, the *Bradley* court refused to speculate on such matters, stating that there was "no indication" of such possible changes in behavior. 416 U.S. at 721.

The ridiculous suggestion that Kaiser might not have destroyed Plaintiffs' business if it had known that it would have to pay a compensatory rate of interest for delay in payment of the judgment is understandably not raised by Kaiser. Moreover, Kaiser could have, but chose not to, stop the running of interest by paying the amount due into court. *Cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

Thus, in considering the *Bradley* factors, the Court of Appeals reached the correct conclusion that there was no manifest injustice in the application of current law, because:

(1) The public policy of the antitrust laws and the private attorney general role of Plaintiffs in enforcing those laws implicates national concerns.

(2) Application of current law does not alter any vested property rights. As the Court of Appeals correctly held:

> Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

865 F.2d at 575, Pet. A-22.

(3) The imposition of a more nearly compensatory rate of interest did not impose any "new and unanticipated obligations" that might have altered Kaiser's conduct in intentionally destroying Plaintiffs' business.

Moreover, there is obviously no manifest injustice in carrying out the intent of Congress to override inadequate state law rates of interest such as Pennsylvania's 6% rate, particularly now—more than six years after the effective date of the amendment as declared by Congress. The Court of Appeals reached the correct result on the applicable law and therefore there is no reason to grant certiorari.

7. The Court Of Appeals Decision Is Completely Consistent With Longstanding Precedent Of This Court, Dating Back To The Nineteenth Century, That A Change In The Interest Rate On A Damage Award Does Not Affect Vested Rights

Almost 100 years ago, this Court specifically held that the owner of a judgment has no *vested* right to receive any particular rate of interest on a judgment, *even after that judgment has become a final controlling judgment after the expiration of all appeals. Morley v. Lake Shore &*

Michigan Southern R. Co., 146 U.S. 162, 168-69 (1892). *A fortiori*, Kaiser is foreclosed from contending that it is somehow prejudiced by a change in the interest rate mandated under the federal interest statute *prior* to the date of a final controlling, non-appealable judgment.

Similarly in *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933), dealing with prejudgment interest, this Court held that interest imposed by statute on damages for breach of contract can be applied to causes of action arising *before* the statute was enacted. *Id.* at 167-68. The Court stated that the statute "concerns the remedy and does not disturb the obligations of the contract." *Id.* at 167.[23]

8. Kaiser's Disingenuous Effort Of Confusing Two Classes Of Cases (Retroactive Legislation Altering Substantive Vested Property Rights Versus Remedial Or Procedural Changes Affecting Pending Litigation) To Create The Appearance Of A Conflict Among The Circuits That Does Not Exist, Should Be Rejected Out Of Hand

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[23] The Court in *Funkhouser* acknowledged that altering statutory rates of interest is within "the power of the State to provide remedies for enforcement and secure adequate redress in case of breach." *Id.* at 168 (citation omitted). That well-recognized legislature prerogative did not impair the parties' due process rights, and thus " 'to enact laws providing remedies for a violation of contracts' and 'to alter or enlarge those remedies from time to time' was within the competency of the legislature." *Id.* at 167 (quoting *Waggoner v. Flack*, 188 U.S. 595, 603 (1903)).

See also Sprang Industries v. Aetna Casualty & Surety Co., 512 F.2d 365, 371-72 (2d Cir. 1975) (no right to particular rate of interest on contract damages that would prohibit change in statutory interest before satisfaction of judgment); *Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp.*, 684 F.2d 1383, 1388-89 (11th Cir. 1982) (where statutory rate of interest changed after judgment, party owing damages "has no vested right to a continued 7% rate of interest on judgments entered against it; the rate of interest is a creature of statute, not contract").

Kaiser, in attempting to create the illusion of conflict among the circuits, improperly lumps together two completely different classes of cases: *one* prohibiting retroactive application of statutes to defeat vested property rights and *the other* involving procedural or remedial changes that should be applied to pending cases absent manifest injustice.

This Court in *Bradley* perceptively recognized that difference:[24]

> This court in the past has recognized a distinction between the application of a change in law that takes place while a case is on direct review on the one hand and its effect on a final judgment under collateral attack on the other. *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). We are concerned here only with direct review.

Id. at 710-11 (footnote omitted). As this Court made clear in *Bradley*, any confusion on this issue was resolved by *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), which held that "an appellate court must apply the law in effect at the time it renders its decision." *Id.* at 281 (quoted in *Bradley*, 416 U.S. at 714).

The Court of Appeals recognized this basic distinction, and thus found no conflict between the *Bradley* rule that applies to pending cases, and true retroactivity, where "application of the new law would affect rights or obligations existing prior to the change in law." 865 F.2d at 573. Other circuits addressing the application of the amended § 1961 to pending cases have also had no difficulty recognizing the difference. *See, e.g., Campbell v. United States*, 809 F.2d 563, 570-71 (9th Cir. 1987).

As the court below recognized, the line of cases referring to a presumption against retroactivity involved the distinguishable problem of true retroactive application

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[24] Blacks Law Dictionary defines retroactive laws as those which "take away or impair *vested* rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transaction or considerations already past." (emphasis added)

of law to defeat *vested property rights*.[25] Kaiser incorrectly cites these same cases as evideince of a "serious conflict." Pet. at 14-15.

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[25] *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), for example, involved the retroactive application of a section of the 1978 Bankruptcy Act to exclude household items from creditors liens already in existence. This Court invalidated the retroactive application of this statute because it impaired "antecedent rights" that were fully vested. *Id.* at 79.

Bowen v. Georgetown University Hospital, 109 S. Ct. 468 (1988), involved a 1984 regulation that changed the method for calculating reimbursement to hospitals providing Medicare treatment in 1981 and 1982. *Id.* at 470-71. The rights affected by this regulation had been vested and established prior to the promulgation of the regulation, a totally distinguishable situation from *Bonjorno*, where the final controlling judgment was not entered by the Court of Appeals until December 1984, two years after the effective date of the change in § 1961, and was not finalized until this Court's denial of certiorari in 1986. Moreover, in *Georgetown University*, the legislative history clearly "expressed a desire to forbid retroactive cost limit rules" according to the Court. *Id.* at 474. Yet even though the *Georgetown University* opinion does not even cite or refer to this Court's unanimous opinion in *Bradley*, Kaiser relies upon *Georgetown University* for the proposition that *Bradley* "is no longer viable." Pet. at 14.

In *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928) the Court considered the application of a 1924 change in the time period for which interest will be paid on tax overcharges. The Court held that the interest should be paid in accordance with the old interest provision, which was still in effect on the last day for which interest was payable, when the Commissioner approved the payment of the interest owing. *Id.* at 162 (citing *Girard Trust Co. v. United States*, 270 U.S. 163, 169 (1926) (interest is payable on tax overcharges only up to date Commissioner approves payment)).

See also Greene v. United States, 376 U.S. 149 (1964) (having previously won a declaration by Supreme Court that revocation of security clearance was invalid, plaintiff was entitled to compensation under regulation in force at the time of final declaration); *Shwab v. Doyle*, 258 U.S. 529 (1922) (1916 tax statute did not apply retroactively to transactions previously consummated); *Union Pacific Ry. v. Lara-*

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9. This Court's Denial Of Certiorari In *Chattem, Inc. v. Bailey*, And Subsequent Developments, Demonstrate That There Is No Division Among The Circuits On The Equity Of The Statute, Which Allows Interest To Date Back Earlier Than The Ultimate And Final Judgment

Kaiser's suggestion that it owes only two days interest (from the date of issuance of the Court of Appeals' mandate after denial of certiorari by this Court until it paid an amount equal to the principal amount of the judgment) is simply unconscionable. Kaiser contends that interest should run from July 1, 1986. Pet. at 24 n.10. Contrary to Kaiser's contentions, under longstanding authority, the "equity of the statute" allows interest to date back to a date earlier than entry of the judgment on remand. *See National Bank of Commerce of New York v. Mechanics National Bank*, 94 U.S. 437, 439 (1877) (noting the "equity of the statute").

Moreover, Kaiser's position is contradicted by Fed. R. App. P. 37, which mandates interest back to the original district court judgment in case of an affirmance, and grants the Court of Appeals discretion as to the allowance of interest in the event a judgment is modified or reversed. *See also* 28 U.S.C. § 1912.

This Court denied certiorari last Term on similar issues presented in *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988) (with Mr. Justice White dissenting from denial of cert.). Since that denial of certiorari, at least one circuit has noted that the adoption of Fed. R. App. P. 37 effectively overruled any precedent that might have seemed to be in conflict with the

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mie Stock Yards Co., 231 U.S. 190 (1913) (Act of Congress retroactively affecting established property rights in railroad rights of way was invalid); *United States v. American Sugar Refining Co.*, 202 U.S. 563 (1906) (treaty with Cuba not intended to apply import duty to shipments made prior to ratification).

majority rule as expressed by the Third Circuit and other circuits. *See Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988).

Contrary to Kaiser's suggestion of a conflict among the circuits, the circuits are generally in accord that the Court has discretion under the equity of the statute in establishing the date from which interest will run and it is the discretion granted to the Court and not any conflicting interpretation of the law that accounts for differences on the facts of specific cases as to when interest begins to run. The older cases in certain circuits adopting a narrow interpretation of § 1961 are no longer viable after the adoption of Fed. R. App. P. 37 in 1968, and presumably all of the Courts of Appeals will or already have come into line with the majority which includes the Third Circuit, as the Second Circuit has recently done.[26] This issue does not present a substantial conflict among the circuits warranting the attention of the Supreme Court.

Moreover, to the extent Kaiser may now seek to contend that both the district court and the Court of Appeals (which was unanimous on this issue) abused their discretion in commencing interest as of December 2, 1981

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26 *See United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971); *Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986); *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 945 (7th Cir. 1984) (per curiam); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988); *Georgia Association of Retarded Citizens v. McDaniel*, 855 F.2d 794, 799 (11th Cir. 1988); *cf. Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988) ("Interest on an attorney fee award . . . runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.").

rather than December 4, 1981, the court should deny Kaiser's Petition because:

(1) Kaiser failed to present argument on this issue in the Court below;

(2) the Court below had discretion in setting the date to commence interest;

(3) Plaintiffs counsel specifically requested the District Court to enter judgment on December 2, 1981 when the verdict was rendered, but the Court delayed entry for two days notwithstanding Fed. R. Civ. P. 58 which requires entry of judgment "forthwith";

(4) two days of interest is a de minimus issue which does not warrant the attention of this Court; and

(5) the only real significance of the distinction between December 2 and December 4 is in determining which Treasury bill rate applies—an issue which has been remanded to the district court for decision and is not ripe for consideration by this Court.

None of the arguments raised by Kaiser relating to the time period of interest, present any substantial issues warranting certiorari.

10. The Court Of Appeals' Opinion Represents A Compromise Of The Difficult Issues Presented To It And This Court Should Not Unravel That Compromise By Considering The Limited Issues Presented In Kaiser's Petition

Federal Rule of Appellate Procedure 37 grants the Cour of Appeals broad discretion in determining appropriate interest awards. Kaiser's certiorari petition seeks to take that discretion away from the Court of Appeals, and attempts to establish rigid rules that would achieve results contrary to the policy behind the federal interest statute, which is to preserve the value of the judgment against diminution due to loss of the time value of money.

Since August 1979, Kaiser has delayed full payment to Plaintiffs for liability under the antitrust laws. If Kai-

ser is to delay payment on the judgment, it must expect to pay adequate interest to preserve the value of the judgment against diminution due to the time value of money.

In light of the decision reached by the Court of Appeals, Plaintiffs cannot let Kaiser's petition for certiorari go unanswered. Plaintiffs present the issues upon which they were denied relief by the Court of Appeals in a separate Cross-Petition, which is asserted only in the unlikely event that this Court grants Kaiser's petition. The issues raised in Kaiser's petition (in particular the issue of manifest injustice under *Bradley*) cannot be considered in the absence of consideration of the denial of 2½ years interest and the denial of interest at market rates.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that Kaiser's petition for certiorari be denied. If the Court should grant Kaiser's petition, Plaintiffs respectfully request that the Court grant their Cross-Petition in order for the Court fully to consider the interrelated interest issues to do justice as between the parties.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR,
and BARBARA K. CLISBY,
Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents have not raised one valid reason why this Court should not grant review in this case.

A. The Remand Order Of The Court Of Appeals Does Not Prevent Review By This Court.

The fact that the Court of Appeals remanded the case to the district court to calculate interest poses no obstacle to review by this Court.[1]

Respondents concede that this Court has jurisdiction. Resp. Brief at 2. Moreover, review of the Court of Appeals' order — even if it were arguably not final — would be appropriate for the same reasons it was appropriate in *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In *General Motors*, the Court of Appeals reversed a compensation judgment in a condemnation proceeding by the United States and remanded the cause for determination of the appropriate compensation pursuant to a different formula than used by the district court. Despite the fact that the amount of the compensation remained to be calculated under the new formula, this Court noted the conflict among the circuits and explained: "*We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.*" (Emphasis added). *See Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916) (when conflict exists among lower federal courts, review of non-final judgment is appropriate).

Likewise here, where a direct conflict exists among the circuits, and where a ruling of non-retroactivity would completely eliminate the need for any further

1. Respondents misleadingly state that the Court of Appeals has remanded "a major issue" to the district court. Resp. Brief at 11. On the contrary, while a large sum of money hinges on the result of the determination by the district court, the legal issue is extremely circumscribed and requires the district court simply to choose between two T-bill interest rates.

proceedings, this Court should exercise its jurisdiction to review the erroneous decision of the Court of Appeals.

B. The Retroactivity Holding Of The Court Of Appeals And This Court's Resolution Of That Issue Has Significant And Far-reaching Implications.

Contrary to respondents' suggestion, the issue of whether amended § 1961 applies to judgments entered prior to its effective date is a live issue. Indeed, within *the last two weeks* another court of appeals addressed the issue and concluded, contrary to the Court of Appeals in this case, that amended § 1961 is *not* to be applied retroactively. *See Evans v. City of Chicago*, Nos. 87-3006, 87-3085, Slip. op. (7th Cir. April 27, 1989).

Respondents wrongly suggest that the only cases subject to the decision of the Court of Appeals and to a decision by this Court on the retroactive effect of amended § 1961 are cases considered "open" by the Clerk's office of the Eastern District of Pennsylvania. Respondents do not explain how they derived their list of "open" cases in the district court, but it is clear that this is a meaningless statistic. The Eastern District of Pennsylvania Clerk's Office ordinarily considers a case "closed" *when judgment is entered in the district court*, regardless of the appellate status of the case.

Kaiser has identified the class of cases potentially subject to the retroactivity holding of the Court of Appeals: judgments entered prior to October 1, 1982 which have not been satisfied. Any judgment creditor holding a pre-amendment unsatisfied judgment that petitions the district court with respect to allowance of postjudgment interest, may receive "open" status in the clerk's office once more. Respondents' reliance on any compilation of currently "open" cases solely in the Eastern District of Pennsylvania to determine which

cases would be subject to the decision of this Court or the Court of Appeals is misplaced.[2]

The Court of Appeals' decision in this case would require courts to apply amended § 1961 to any case where the calculation of the amount of postjudgment interest has remained unresolved up to this time, and is hereafter put into issue by one of the parties. *See Bradley*, 416 U.S. 696, 710 (1974); *Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987). A decision by this Court would affect this category of cases throughout the nation. The issue remains a significant one, the implications of which are not confined to the Third Circuit. Each of the pre-amendment judgments which have not been marked satisfied may carry postjudgment interest. Unless the district court ruled in advance on the appropriate rate of postjudgment interest, which is highly unlikely, each of the thousands of "unsatisfied" pre-amendment judgments in the Eastern District of Pennsylvania, as well as the tens of thousands of pre-amendment unsatisfied judgments in other district courts throughout the nation, may give rise to further proceedings, just like these, in which the district court will address the appropriate calculation of postjudgment interest.

Respondents have not refuted Kaiser's showing that a decision by this Court on the issue of the retroactive application of amended § 1961 would affect a substantial number of interest calculations upon which turn hundreds of millions of dollars in postjudgment interest.

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2. Respondents have not argued in favor of another potential interpretation which would apply the *Bradley* analysis only to cases in which the *merits* of the underlying action were pending on appeal on or before October 1, 1982, the effective date of amended § 1961. To determine the volume of these cases would require a review of all of the docket sheets, both in the district courts and in the courts of appeals, in the cases in which there are judgments which have not been marked satisfied, to determine if an appeal *on the merits* had lasted beyond October 1, 1982.

C. The Circuits Are In Direct Conflict On The Issues Presented By Kaiser's Petition.

Respondents incorrectly suggest that there is no conflict among the circuits on whether amended § 1961 applies to a judgment entered prior to its effective date. They reason that no conflict can occur because the question of possible "manifest injustice" resulting from retroactive application must be decided on a case-by-case basis and, therefore, any decision on the question has no precedential value.[3] The fallacy in respondents' position is easily exposed.

First, the case-by-case approach suggested by respondents stems only from the "manifest injustice" exception to the *Bradley* rule, which is simply one of three exceptions. Putting "manifest injustice" aside, Kaiser has demonstrated that there is a direct conflict among the circuits with respect to the applicability of the other two exceptions (i.e., whether either the language of the statute, or its legislative history, or both, provide a fair indication that it should be construed to apply prospectively only). Neither of these exceptions is linked to the facts of any particular case. Kaiser Petition at 10-11.

3. Respondents attempt to distinguish on its facts the conflicting decision by the court in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2nd Cir. 1984), a case identical in all pertinent respects to this case. They argue that unlike *Litton*, this case involves "vicious predatory conduct which is a classic treble damage case." Resp. Brief at 18. While Kaiser has not quibbled with respondents' continuous vituperative characterizations of its conduct, this Court should note that the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division filed a brief at the request of this Court in which they argued against certiorari on the underlying merits of this case on the ground that the liability finding was so wrong that it would never be followed: "we would have grave doubts that the evidence suffices to sustain a verdict under Section 2 because Kaiser's conduct may well be characterized as no more than aggressive competition." U.S. Amicus Curiae Brief, at 17-18.

Furthermore, if *Bradley* requires a case-specific analysis to determine the retroactivity of amended § 1961, as the Court of Appeals decision suggests, it plainly illustrates the need for review and reversal by this Court. There is no dispute that in amending § 1961, Congress intended to promote a goal of *uniformity* in calculating postjudgment interest on judgments obtained in federal courts. Yet the Court of Appeals' decision may require a far more individualized determination of the appropriate interest rate than the statute required prior to its amendment. This Court should not permit such a perversion of Congress' intent in amending § 1961.[4]

D. The Presumption Against Retroactive Application Of Statutes Applies Here And The Issue Is Properly Before This Court.

Kaiser has properly raised the issue of whether the analysis prescribed by *Bradley v. School Board*, 416 U.S. 696 (1974), applies to this case. Respondents wrongly suggest that Kaiser is precluded from advancing this argument because it failed to raise it until its Petition for Rehearing before the Court of Appeals, filed on January 23, 1989. However, Kaiser's argument rests on this Court's decision in *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988) — *a decision rendered after all briefing and after oral argument before the Court of Appeals in this case.* Kaiser raised this argument at the first opportunity. The issue is properly before this Court.[5]

4. Respondents argue that, under *Bradley*, the retroactive application of a statute *always* may differ from case to case. Assuming this is a correct reading of *Bradley*, this Court's implicit, wholesale rejection of the *Bradley* approach in *Georgetown* was well-founded.

5. Even if Kaiser had a prior opportunity to raise this issue and failed to do so — which is not the case — this Court may nevertheless entertain Kaiser's argument. *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980).

Respondents wrongly attempt to explain away the unequivocal presumption *against* retroactive application of statutes announced in *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988), on the ground that it simply "prohibit[s] retroactive application of statutes to defeat vested property rights. . . ." Resp. Brief at 25. Respondents confuse statutory interpretation with constitutional requirements of due process. *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936). When retroactive application of a statute defeats "vested property rights", it is prohibited by the Constitution. The constitutional prohibition bears no relation to the rule of statutory construction which simply provides the framework for proper interpretation of a statute silent on the issue of retroactivity. *Id.* Justice Scalia, concurring in *Georgetown*, recognized this critical distinction. *See Georgetown*, 109 S. Ct. at 479.

Moreover, this Court in *Georgetown* relied on *Greene v. United States*, 376 U.S. 149 (1964), and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), for the general presumption *against* retroactivity. Neither of those decisions turned on whether the rights involved were "vested property rights". In fact, the *Magnolia* case dealt with retroactive application of a change in an interest rate — the exact situation which respondents contend does not implicate vested property rights.

E. There Is A Direct Conflict Among The Circuits As To The Date From Which Interest Begins To Accrue And The Issue Is Properly Before This Court.

The Third Circuit's holding that postjudgment interest *must* commence on the date of the damage *verdict* conflicts with all other circuit courts of appeals to have addressed this issue. Contrary to the argument in respondents' brief, the Third Circuit in this case did not

adopt a discretionary approach which *allows* postjudgment interest to accrue from the date of the verdict when an "inordinate" delay renders it inequitable to measure from the date of the judgment. Rather, the Third Circuit's decision *requires* postjudgment interest "calculated from the date of the damage verdict underlying the appropriate judgment." Kaiser Petition at A-14. It thereby conflicts *both* with the decisions in circuits which have adopted the "equitable construction" approach and with the position of the Court of Appeals for the District of Columbia Circuit which refuses to calculate interest from a date other than the date of "judgment". *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614, 616-18 (D.C. Cir. 1980).

Kaiser's argument that the Court of Appeals chose the incorrect date to begin the accrual of postjudgment interest is properly before this Court. Before the district court, Kaiser argued that interest should run from July 1, 1986. Kaiser Petition at A-38 through A-39. Before the Third Circuit, Kaiser preserved its position that the district court had wrongly chosen to measure the accrual of interest from December 2, 1981 and should have measured interest from July 1, 1986.[6]

In addition, contrary to respondent's suggestion at page 12, n.7 of their brief, Kaiser has remained entirely consistent with respect to the appropriate interest rate. It has maintained throughout these postjudgment interest proceedings that if the judgment from which interest was measured fell prior to the effective date of amended § 1961, the prior version should govern the calculation of interest. If the Court determined that interest ran

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6. Kaiser correctly predicted, however, that the Court would consider itself constrained by its prior holding in *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3rd Cir. 1987), to measure interest from the date of the damage verdict underlying the judgment.

from a date *after* the effective date of amended 1961, Kaiser has always maintained that the amended version should apply.

F. The Decision Of The Court Of Appeals Was Wrong.

Respondents argue that the Third Circuit's decision was correct and, therefore, review should be denied. In fact, the Third Circuit was wrong in (1) applying the *Bradley* analysis at all; (2) failing to recognize that both the language and legislative history of amended § 1961 show that Congress intended it to apply prospectively only; (3) failing to recognize the manifest injustice in applying amended § 1961 to the December 4, 1981 judgment in this case; and (4) choosing December 2, 1981 as the appropriate "judgment" date from which to begin the accrual of postjudgment interest.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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No. 88-1595

In The

Supreme Court of the United States

October Term, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO CERTIORARI PURSUANT TO RULE 22.6 REGARDING *EVANS v. CITY OF CHICAGO*, NOS. 87-3006, 87-3085, 1989 U.S. APP. LEXIS 5899 (7TH CIR. APR. 27, 1989)

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I. REASON FOR SUPPLEMENTAL BRIEF

Respondents submit this Supplemental Brief, pursuant to Supreme Court Rule 22.6, in opposition to Kaiser's Petition for Certiorari to address a new case that was not available at the time of Respondents' last filing.

This new case, *Evans v. City of Chicago*, Nos. 87-3006 and 87-3085, 1989 U.S. App. LEXIS 5899 (7th Cir. Apr. 27, 1989), which was cited in Petitioners' Reply Brief at 2, demonstrates the fallacies in Kaiser's arguments and the reasons why the issues presented in Kaiser's certiorari petition do not present any issues with any ongoing precedential value, and why the issue of the applicable law was properly decided in favor of Respondents by the Court below.

The contrast between the issues presented in the *Evans* case and the issues in the present case vividly demonstrates the difference between: (1) collateral attack on a final controlling judgment by retroactive application of new law (*Evans*) and (2) procedural changes affecting pending litigation (*Bonjorno v. Kaiser*).

II. THE *EVANS* CASE ILLUSTRATES THE FALLACY OF KAISER'S CONTENTIONS REGARDING REASONS FOR REVIEW BY THIS COURT

A. The *Evans* Case Did Not Address The Issue Of Application Of Amended 28 U.S.C. §1961 To Cases Pending As Of The Effective Date Of The Amendment With Interest Issues Still Currently Pending In The Courts

The *Evans* case involved a class action by several separate plaintiff classes of judgment creditors holding judgments against the City of Chicago. The classes

contended that the City of Chicago denied them equal protection of the laws or due process, by its policy regarding delay of payment of judgments.

The three class representatives in the *Evans* suit (Silvia Evans, Bertha Balark, Curtis Collum) sought relief relating to the delay by the City of Chicago in paying their judgments that had already been rendered as final controlling judgments on which interest could also be collected,[1] *prior* to October 1, 1982. Thus, none of the class plaintiffs in the Evans case was in a position similar to the Plaintiffs/Respondents in the present case, a case where there was no final judgment and which was pending unresolved in the courts as of the effective date of the amendment to 28 U.S.C. §1961, and where the interest issues are still pending today.

The parties in the *Evans* case did not raise any issue as to the applicability of amended 28 U.S.C. §1961 to any of the judgments at issue in the *Evans* case. The Seventh Circuit in its Opinion in *Evans*, however, sua sponte noted this issue. Citing its prior decision in *Merit Insurance Company v. Leatherby Insurance Company*, 728 F.2d 943, 944 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984), the Seventh Circuit stated that the new rate of interest provided in amended 28 U.S.C. §1961 "does not apply to judgments entered before the effective date of the statute."

The Seventh Circuit stated, however, "[o]n judgments entered in federal district court after October 1, 1982, the City must pay the interest rate prescribed by 28 U.S.C. §1961(a) and provide all relief ordered by the court."

---

[1] The "Collum" class members in the *Evans* case were judgment creditors unwilling or unable to wait out the delay in payment. They had discounted their judgments by selling them to third parties. *See Evans*, 1989 U.S. App. LEXIS 5899, *5-*6.

Although the class of judgment creditors certified in the *Evans* case might conceivably include some judgment creditors whose original district court judgments were entered prior to the effective date of the statute, and whose cases were pending on appeal as of the effective date of the amendment, there is no suggestion that any such limited members of the class timely preserved the issue of the applicable interest rate, as did the Plaintiffs/Respondents in the present case. Thus neither the holding nor the dicta of *Evans* conflicts in any way with the holding of the Court of Appeals in the present case.

B. A Comparison Of *Evans* To The Present Case Reveals The Fallacy Of Kaiser's Contentions That A Large Class Of Cases Might Be Affected By Any Precedent Set By The Court Of Appeals' Decision

Kaiser wrongly persists in contending that the limited fact-specific holding of the Court of Appeals in the present case could affect thousands of final controlling judgments entered prior to October 1, 1982, which it contends have not yet been marked as "satisfied" by records kept by the District Court Clerk's office. The simple undisputed and undeniable fact recognized in the Court of Appeals' Opinion in the present case contradicting Kaiser's contentions is that no final controlling judgment was entered in the present case until years after the effective date of the amendment to §1961.

Despite Kaiser's failure to discuss the issue in its appellate brief, the Court of Appeals, in the present case, correctly recognized the distinction between retroactive

application of new law and the *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), analysis regarding application of current law to *pending* cases:

> The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law. [citations omitted].

Bonjorno v. Kaiser Aluminum & Chemical Corp., 865 F.2d 566, 573 (3d Cir. 1989), Kaiser's Petition at A-17.

The Court of Appeals correctly concluded that the right to receive interest did not vest until a final controlling judgment was entered on the merits, well after the effective date of the amendment to 28 U.S.C. §1961:

> Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

Bonjorno v. Kaiser Aluminum & Chemical Corp., 865 F.2d at 575, Kaiser's Petition at A-22.

Kaiser attempts to ignore the distinction between cases in which a final controlling judgment was entered prior to October 1, 1982 (e.g., *Evans*) and cases still pending in the Courts as of that date although a verdict or judgment has been entered in the district court (e.g., *Bonjorno v. Kaiser*). Although judgment creditors who obtained a final controlling judgment prior to the effective date of the amendment might contend that they ought to be entitled to interest at the T-bill rate provided in the amended statute, they clearly could not do so under the *Bradley v. School Board* analysis set forth in the Court of Appeals' Opinion in the present case regarding the application of current law to cases pending in the

courts. Where a final controlling judgment was entered prior to October 1, 1982, the *Bradley* analysis would emphatically *not* apply. Kaiser's suggestion that the Court of Appeals' decision could affect judgments in that category is therefore incorrect.

The Court of Appeals' Opinion could conceivably affect other cases in which an original verdict or judgment was entered prior to October 1, 1982 but only those in which a final controlling collectible judgment was entered after that date. Because of the passage of time, that is obviously a very narrow category of cases, and is not a category Kaiser has even attempted to quantify.

Finally, the difference between cases such as *Evans* (involving final controlling judgments entered prior to October 1, 1982) and the present case (involving litigation pending in the Courts as of October 1, 1982 and still pending today) demonstrates that Kaiser's contentions that *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), somehow altered the law are disingenuous.[2]

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[2] The *Bowen* case provides no basis whatsoever for Kaiser's explanation as to why it relied on *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974) in the court below and now seeks to disavow the *Bradley* rule.

Kaiser improperly attempts to excuse its dramatic change of position on the applicability of *Bradley* by contending that *Bowen* somehow altered the law, despite the fact that *Bowen* did not even mention or cite *Bradley*. Kaiser's Reply Brief at 5.

Bowen merely dealt with the issue of an attempt to collaterally attack a final controlling judgment, which has nothing to do with the category of cases covered by *Bradley*.

Moreover, as Kaiser acknowledges, *Bowen* did not state any new principles of law, but merely reiterated this Court's hoary precedent.

Bowen v. Georgetown involved an attempt at retroactive rulemaking by a federal agency attempting to overrule the effect of a federal district court judgment as to which the Secretary had taken no appeal, and the time for appeal had elapsed, thus constituting an attempt to alter a fi. al controlling judgment. *Bowen v. Georgetown* has nothing to do with the *Bradley* analysis regarding application of current law to *pending* cases absent manifest injustice. Like *Evans*, and unlike the present case, *Bowen v. Georgetown* involved an attempt to collaterally alter the effect of a final controlling judgment.

III. CONCLUSION

For the reasons stated above, Respondents respectfully submit that the *Evans* case does not support Petitioners, as advanced in their Reply Brief at page 2. Rather it supports the arguments set forth in Respondents' Brief in Opposition to Kaiser's petition for certiorari. Respectfully, Respondents request that the Court deny Kaiser's petition.

Respectfully Submitted,

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No. 88-1595, 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners, Cross-Respondents,

v.

JOSEPH A. BONJORNO, LORRAINE KERR (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.) and BARBARA K. CLISBY,
Respondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
C.A. 74-122

	Date	*Proceedings*
	1974	
1	Jan 17	Complaint filed.
	Jan 17	Summons exit.
	Jan 17	JURY TRIAL DEMANDED.
2	Jan 17	Plff's requests for production of documents – First Set, filed.
3	Jan 17	Plff's motion for substituted service pursuant to FRCP 4(d)(7), filed.
[3]	Jan 18	ORDER that service of summons, complaint, and other process may be made on defts (Kaiser Ind., Kennedy Culvert, and R.A. Kennedy) by service on the Secty. of the Dept. of State of Comm. Pa., filed. AL 1-21-74 Entered & copies mailed.
4	Feb 11	Appearance of Stradley, Ronon, Stevens & Young as counsel for defts R.A. Kennedy and Kennedy Culvert & Supply Company, filed.
5	Feb 12	Stipulation that defts R.A. Kennedy and Kennedy Culvert & Supply Company's time within which to file their answer is extended to 2-20-74, with Clerk's approval, filed. CLERK
6	Feb 13	Summons returned "on 1-23-74 served Secty. of Commonwealth, Robert A. Kennedy, and Kennedy Culvert & Supply Company, all by Registered Mail; on 1-24-74 served Kaiser Industries Corporation, by Registered Mail; on 1-31-74 served Kaiser Aliminum & Chemical Corporation," filed.
7	Feb 20	Motion of Kennedy Culvert & Supply Company to dismiss complaint, presenting defenses of lack of service of process, jurisdiction, impropc : venue and failure to state a

Date		Proceedings
1974		
		claim; notice of motion; filed.
8	Feb 20	Motion of Robert A. Kennedy to dismiss complaint, presenting defenses of lack of service of process, jurisdiction, improper venue and failure to state a claim; notice of motion; filed.
9	Feb 20	Motion of deft Kaiser Industries Corporation to dismiss for lack of *in personam* jurisdiction, improper venue, and insufficiency of service of process; notice of motion; memorandum in support of motion to dismiss, filed.
10	Feb 20	Answer of deft Kaiser Aluminum & Chemical Corporation, filed. (1 of 4)
11	Feb 20	Deft Kaiser Aluminum & Chemical Corporation's First Set of interrogatories to plff, filed.
12	Feb 20	Deft Kaiser Aluminum & Chemical Corporation's First Request for the production of documents, filed.
13	Feb 21	Praecipe to issue alias summons as to Kennedy Culvert and Supply Company, filed.
	Feb 21	Alias summons, as to Kennedy Culvert & Supply Company, exit.
14	Mar 1	ORDER [dated 2-28-74] that this action be reassigned from the calendar of Judge Luongo to the calendar of Judge Green, filed. VA 3-4-74 Entered & copies mailed.
15	Mar 11	Plff's response to motions of defts Robert A. Kennedy and Kennedy Culvert & Supply Company to dismiss, filed.
16	Mar 11	Plff's first set of interrogatories to defts, Robert A. Kennedy and Kennedy Culvert & Supply Company, filed.

Date		Proceedings
1974		
17	Mar 11	Plff's request to defts Robert A. Kennedy and Kennedy Culvert & Supply Company for production of documents, filed.
	Mar 13	Memorandum of Robert A. Kennedy and Kennedy Culvert & Supply Company in support of motions to dismiss under FRCP Rule 12; notice pursuant to FRCP Rule 36; affidavits of Robert A. Kennedy, in his individual capacity and as President of Kennedy Culvert & Supply Company, filed.
	Mar 20	ORDER that plff file a memorandum responding to defts' motions to dismiss for lack of jurisdiction and improper venue within 15 days after receipt of the information requested in plff's interrogatories and request for production of documents relating to these issues; decision on said defts' motions to dismiss Count V for failure to state a claim is POSTPONED pending resolution of the motions relating to personal jurisdiction and venue, filed. CG 3-21-74 Entered & copies mailed.
	Mar 21	Alias summons returned "on 3-13-74 served Secty. of Commonwealth and deft Kennedy Culvert & Supply Company, both by Registered Mail," filed.
	Apr 1	Plff's response to deft Kaiser Aluminum & Chemical Corporation's first request for production of documents, filed.
	Apr 1	Objections of plff to deft Kaiser Aluminum & Chemical Corporation's first set of interrogatories, filed.
	Apr 9	Memorandum in support of motion by deft Kaiser Industries Corporation to dismiss the complaint on the grounds of improper

Date	Proceedings
1974	
	venue, insufficiency of service of process and lack of personal jurisdiction; affidavit of James K. Parker in support thereof, filed.
Apr 17	Plff's answers to deft Kaiser Aliminum & Chemical Corporation's first set of interrogatories, filed.
Apr 18	Plff's first set of interrogatories to deft Kaiser Industries Company, filed.
Apr 23	ORDER that this action is reassigned from the calendar of Judge Green to the calendar of Judge McGlynn for all further proceedings, filed. VA/Clk 4-24-74 Entered & copies mailed.
Apr 26	Plff's notice of motion to compel defts Robert A. Kennedy and Kennedy Culvert & Supply Company to produce documents and to strike said defts' motion to dismiss, filed.
May 6	Deft Kennedy Culvert & Supply Company's notice of abandonment of motion to dismiss for improper service of process and for improper venue, filed. [Paper #7]
May 6	Answer of deft Kennedy Culvert & Supply Company, filed (2 of 4)
May 6	CASE LISTED FOR TRIAL.
May 13	Order that pursuant to the Notice of Abandonment of Motion filed on 5-6-74, the motion to dismiss for improper service of process and for improper venue, filed on behalf of Kennedy Culvert & Supply Co., on 2-20-74, is WITHDRAWN, filed. JM/Clerk 5-14-74 entered and copies mailed.
May 14	Plff's Pre-Trial Memorandum pursuant to Local Rule 7, filed.

Date		Proceedings
1974		
	May 20	Objections of deft Kaiser Industries Corporation to plff's first set of interrogatories, filed.
33	May 21	Answers of deft Robert A. Kennedy to plff's first set of interrogatories, filed.
34	May 23	Plff's memorandum opposing motion to dismiss of deft Robert A. Kennedy, filed.
35	Jun 10	Answers of deft Kaiser Industries Corporation to plff's first set of interrogatories, filed.
36	Jun 14	Affidavit of Robert A. Kennedy in further support of his motion to dismiss, filed.
37	Jun 21	Plff's motion to compel answers by deft Kaiser Industries Corporation to interrogatories, notice of motion, and memorandum in support thereof, filed.
38	Jun 21	Plff's response to motion of deft Kaiser Aluminum & Chemical Corporation to compel further answers to first set of interrogatories to plff, filed.
39	Jun 21	Motion of deft Kaiser Aluminum & Chemical Coporation pursuant to FCRP Rule 37 to compel further answers to "first set of interrogatories to plff" and for sanctions, notice of motion, memorandum in support thereof, filed.
40	Jun 21	Stipulation and ORDER re: production of documents and confidentiality, etc., filed.
41	Jun 21	Plff's notice of deposition of Philip Buchy on 7-15-74, filed.
42	Jun 24	Memorandum of deft Kaiser Industries Corporation in opposition to plffs' motion to compel answers to interrogatories, filed.
43	Jun 24	Plffs' praecipe for the issuance of an alias summons as to deft George A. Wenzel, filed.
	Jun 24	Alias summons exit.

Date		Proceedings
1974		
4-	Jun 25	Argued sur motion of deft Robert A. Kenndey to dismiss. . . . . .C.A.V.
44	Jun 28	Plff's motion to compel deft Kaiser Aluminum & Chemical Corporation to produce documents, notice of motion, memorandum in support thereof, filed.
45	Jun 28	Memorandum of deft Kaiser Aluminum & Chemical Corporation in opposition to plff's motion to compel production of documents, filed.
46	Jul 9	Plff's notice of deposition of Robert A. Kennedy, as President of dft Kennedy Culvert & Supply Company on 7-15-74, filed.
47	Jul 11	Plff's answer to deft Kaiser Aluminum & Chemical Corporation's motion to compel further answers to first set of interrogatories, filed.
48	Jul 11	Plff's supplemental answers to deft Kaiser Aluminum & Chemical Corporation's first set of interrogatories, filed.
		No Paper 49 Assigned
50	Jul 21	Reply memorandum of deft Kaiser Aluminum & Chemical Corporation in support of motion to compel further answers to interrogatories, filed.
51	Sep 10	Memorandum and ORDER, McGlynn, J. wherein it is ordered that the motion of deft Robert A. Kennedy to dismiss the complaint is GRANTED, filed. JM 9-11-74 Entered & copies mailed.
	Sept 18	Plff's first set of interrogatories addressed to deft Kaiser Aluminum & Chemical Corporation, filed.
	Sept 24	Plff's motion for reconsideration of Order granting deft Kennedy's motion to dismiss,

Date	Proceedings
1974	
	notice of motion, with memorandum in support thereof, filed.
Oct 2	Memorandum of deft Robert A. Kennedy in opposition to plff's motion for reconsideration, filed.
Oct 7	ORDER that plff's motion for reconsideration is DENIED, filed. JM 10-8-74 Entered & copies mailed.
Oct 9	Plff's notice of appeal, filed. (74-2170)
Oct 9	Copy of clerk's notice of appeal to U.S.C.A., filed.
Oct 21	Bond for Costs on Appeal in the sum of $250.00 with Fidelity and Deposit Company of Maryland as surety, filed.
Oct 21	Appellant's statement pursuant to Rule 10 of Federal Rules of Appellate Procedure, filed.
Oct 25	Deft Kaiser Aluminum & Chemical Corporation's objections to plff's first set of interrogatories addressed to said deft, filed.
Oct 30	Original record transmitted to U.S. Court of Appeals. [Except 43,49]
Nov 7	Deft Kaiser Aluminum & Chemical Corporation's response to plff's requests for production of documents – first set, filed.
Nov 25	Answers of deft Kaiser Aluminum & Chemical Corporation to plff's first interrogatories – first set, filed.
Dec 11	Plff's motion for certification under Rule 54(b), Notice of Motion, Memorandum in support, filed.
Dec 12	Deft., Robert A. Kennedy's answer to plff's motion for certification under Rule 54(b), memorandum contra plff's motion, filed.
Dec 16	Plff's motion for order compelling discovery by Kaiser Aluminum & Chemical Corp ,

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1974		
		Notice of Motion & Memorandum in support, filed.
	Dec 19	Deft Kaiser Aluminum & Chemical Corporation's memorandum in opposition to plff's motion for Order compelling discovery, filed.
1975		
	Jan 7	Plff's reply memo. in support of motion to compel discovery, filed.
	Jan 8	Original record returned from U.S.C.A.
	Jan 8	Certified copy of Order from U.S.C.A. that appelle's motion to dismiss apppeal pursuant to Rule 54(b), F.R.A.P. is granted etc., filed. Aldisert
	Jan 28	Order compelling plff to answer discovery, filed. JM 1/29/75 entered and copies mailed
	Jan 3	ORDER reassigning case from Judge Joseph L. McGlynn, Jr. to Judge Edward N. Cahn, filed. VA 2/6/75 entered and copies mailed Conference memorandum, Scuderi, J., filed.
	Jan 7	Order that judgment be entered in favor of the deft, Robert Kennedy and against the plff, Columbia Metal Culvert Co., Inc., filed. JM 2/10/75 entered and copies mailed.
	Jan 4	Plff's notice of appeal, filed. (75-1362)
	Jan 4	Copy of Clerk's notice of appeal to USCA, filed.
	Jan 31	PRETRIAL CONFERENCE, SCUDERI, J.
74	Mar 5	Deft Kaiser Aluminum & Chemical Corp's notice of deposition of Joseph A. Bonjorno, filed.
75	Mar 5	Deft Kaiser Aluminum & Chemical Corp's

Date		Proceedings
1975		
		Second Set of interrogatories to plff, filed.
76	Mar 5	Deft Kaiser Aluminum & Chemical Corp's Second request for the production of documents, filed.
--	Mar 6	Bond for costs on appeal in the sum of $250.00 with Transamerica Insurance Co. as surety, filed.
77	Mar 7	Plff's interrogatories-Second Set to deft Kaiser Aluminum & Chemical Corp., filed.
78	Mar 10	Appellant's statement pursuant to Rule 10, Federal Rules of Appellate Proceudre, filed.
--	Mar 20	PRETRIAL CONFERENCE, CAHN, J.
79	Mar 24	Conference memorandum, filed.
--	Mar 25	Original record transmitted to USCA. Except papers #43,62,63,67,70,49, and 79.
80	Apr. 4	Deposition of Robert A. Kennedy, filed.
81	Apr. 7	Answers of Kaiser Aluminum & Chemical Corp. to plff's interrogatories-Second Set, filed.
82	Apr. 7	Objections of Kaiser Aluminum & Chemical Corp. to plff's interrogatories-Second Set, filed.
83	Apr. 8	Plff's answers and objections by Columbia Metal Culvert Co., Inc. to Kaiser Aluminum interrogatories-Second Set, filed.
84	May 20	Motion of Kaiser Aluminum & Chemical Corp. for a protective order, notice and memorandum in support, filed.
85	May 20	Plff's response to motion of Kaiser Aluminum & Chemical Corp. for Protective order, filed.
86	May 30	Interrogatories of deft Kennedy Culvert to plff-First Set, filed.
--	June 9	First supplemental record transmitted to

Date		Proceedings
1975		
		USCA. Papers 70, 79 and 80 thru 83 inclusive.
87	June 19	Plff's supplemental answers to interrogatories, filed.
88	Jul 17	Plff's notice of deposition of Kaiser Aluminum & Chemical Corp., etc., filed.
89	Jul 17	Plff's request for production of documents, Second Set as to deft Kaiser Aluminum & Chemical Corp., filed.
90	Jul 25	Plff's motion to amend complaint, notice and memorandum of law in support, filed.
91	Jul 25	Memorandum of Kaiser Aluminum & Chemical Corp. in opposition to motion to amend plff's complaint, filed.
92	Jul 31	Stipulation and Order as follows. Upon representation by counsel for Kaiser Industries Corp., that if Kaiser Industries Corp. were to respond to plff's request for documents, First Set, Request #1 it would respond that it does not have any such documents, etc. and Kaiser Industries Corp. is dropped as a party deft and Kaiser Aluminum & Chemical Sales Inc. is added as a party deft, filed. EC
93	Aug 8	Memorandum of ldefts Robert A. Kennedy and Kennedy Culvert and Supply Co. in opposition to the filing of an amended complaint, filed.
94	Aug. 13	Deft, Kaiser Aluminum & Chemical Corp.'s notice of deposition of Phila. National Bank by Mr. Alex Gusdorff, et al, filed.
--	Aug. 14	Second supplemental record transmitted to USCA. (Not including FPaper #91 & 93
95	Aug. 18	Plff's reply brief in support of motion to amend complaint, filed
96	Sept. 4	Memorandum in response to Letter from

Date		Proceedings
1975		
		Richard P. McElroy, Esq. of 8/22/75, filed.
97	Sept. 23	Certified copy of Order from USCA that appellee's motion to remand appeal is DENIED, filed.
98	Sept. 30	Plff's notice of deposition of Mr. James Caterina, filed.
99	Oct. 1	Plff's answers to interrogatories of deft Kennedy Culvert, First Set, filed.
100	Oct. 29	Plff's notice of deposition of Mr. Larry Lawrence, filed.
101	Nov. 26	Deft, Kaiser Aluminum and Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of George Kerr, filed.
102	Dec. 11	Certified copy of Order received from USCA that the judgments of this Court entered 9-9-74, 10-7-74 and 2-6-75 are REVERSED: Costs taxed against appellee, filed.
--	Dec. 11	Record on appeal and two supplements returned.
103	Dec. 24	Memorandum of deft Robert A. Kennedy in support of motion to dismiss for improper venue, filed.
1976		
104	Jan. 7	Plff's notice of deposition of David Thomas, filed.
105	Jan. 16	Plff's memorandum opposing motion of Robert A. Kennedy to dismiss for improper venue, filed.
106	Feb. 11	ORDER that deft Robert A. Kennedy's motion to dismiss for improper venue is DENIED, filed. EC 2-12-76 entered and copies mailed.
107	Feb. 24	Deposition of Lonsdale R. Lawrence, filed.

	Date	Proceedings
	1976	
108	Mar. 5	Answer of deft., Robert A. Kennedy, filed.
109	Mar. 8	Defts. Robert A. Kennedy et al's notice of taking deposition of Frank Sagendorph, filed.
110	Mar. 17	Plffs notice of deposition of Mr. Ed Rowe, filed.
111	Mar. 25	ORDER that plff's; motion to amend complaint is Granted, and the proposed amended complaint, Exhibit A shall be considered asan amended and supplemental complaint and shall be filed with the title "Amended and supplemental complaint", etd., filed. EC. 3-26-76 entered and copies mailed.
	Mar. 25	AMENDED AND SUPPLEMENTAL COMPLAINT FILED.
112	Apr. 9	Defts, Kennedy and Kennedy Culvert and Supply's amended notice of deposition of Frank Sagendorph, filed.
113	Apr. 30	Answer of Kaiser Aluminum and Chemical Corp. and Kaiswer Aluminum and Chemical Sales, Inc. to amended and supplemental complaint filed.
114	May 3	Answer of deft, Robert A. Kennedy and Kennedy Culvert and Supply Co. to plff's amended complaint, filed.
115	Jun. 24	Deposition of Edward A. Rowe, Jr., filed.
116	July 9	Deft's, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of Kerr Concrete Pipe Co., Inc. etc., filed.
117	July 12	Defts, Kaiser Aluminum & Chemical Corp. et al's notice of deposition of Reynolds Metals Co., etc., filed.
118	June 18	Defts, Kaiser Aluminum & Chemical Corp.

	Date	Proceedings
	1976	
		et al's notice of deposition of Aluminum Co. of America, filed.
119	Aug. 17	Plff's supplemental answers to Kaiser Aluminum's interrogatories, Second Set, filed.
120	Aug. 23	Deposition of Claron E. Parker, filed.
121	Sept. 7	Interrogatories of deft, Kennedy Culvert & Supply Co. to plff, Second Set, filed.
122	Sept. 21	Stipulation of counsel re: entry of Confidentiality Order, filed.
[122]	Sept. 23	CONFIDENTIALITY ORDER that certain documents shall be filed confidentially, etc., filed. EC 9-24-76 entered and copies mailed.
123	Oct. 8	Rule 37 motion to compel Kennedy Culvert & Supply Co. to produce financial statements by plff with memorandum in support, filed.
124	Oct. 8	Plff's interrogatories to defts re expert testimony, filed.
125	Oct. 15	Plff's answers to interrogatories of deft, Kennedy Culvert & Supply Co., Second Set, filed.
126	Nov. 2	Answer of Robert A. Kennedy and Kennedy Culvert & Supply Co. to plff's third set of interrogatories, filed.
127	Nov. 16	Answers of Kaiser Aluminum & Chemical et al to plff's interrogatories re Expert Testimony, filed.
128	Nov. 22	Plff's motion under Rule 37 to compel Kennedy Culver t& Supply Co. to produce financial statment, notice and memorandum of law, filed.
129	Nov. 22	Deft, Kennedy Culvert & Supply Co.'s memorandum of law in opposition to plff's Rule 37 motion, filed.

	Date	Proceedings
	1976	
130	Nov. 30	ORDER that all discovery shall be completed by 12-31-76; a pretrial conference will be held on 1-18-77 at 9:15 am. and this action is set for jury trial during the month of February, 1977, filed. 12-1-76 entered - - copies mailed.
131	Dec. 1	Plff's interrogatories, First Set to deft, Kennedy Culvert & Supply Co., filed.
132	Dec. 1	Plff's requests for admissions to deft, Kaiser Aluminum & Chemical Corp., filed.
133	Dec. 1	Plff's request for admission to Kaiser Aluminum & Chemical Sales, Inc., filed.
134	Dec. 7	Plff's notice of deposition of C. E. Parker, filed.
135	Dec. 8	Plff's memorandum in opposition to motions of Kennedy Culvert & Supply Corp., filed.
136	Dec. 8	Deft, Kennedy Culvert's motion to compel plff to answer depositions questions pursuant to F.R.C.P.37(a)(2) and notice thereof, filed.
137	Dec. 8	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s motion to compel plff to answer interrogatories with notice thereof, filed.
138	Dec. 8	Memorandum of law of defts, Robert A. Kennedy and Kennedy Culvert & Supply Co. in support of their motion to compel plff to be deposed and; to respond to questions on the issue of damages, filed.
139	Dec. 8	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s memorandum of law in support of their motion to compel answers to interrogatories, filed.
140	Dec. 8	Motion of defts Robert A. Kennedy and Kennedy Culvert & Supply Co. to compel

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	1976	
		plff to be deposed and to respond to questions of the issue of damages pursuant to F.R.C.P. 37 with notice thereof, filed.
141	Dec. 8	Memorandum in support of motion of deft, Kennedy Cuvlvert's for order compelling discovery, filed.
142	Dec. 17	Motion of Kaiser Aluminum & Chemical Corp. for a protective order vacating Columbia Metal Culvert Co., Inc.'s notice of deposition of C. E. Parket, notice and memorandum of law in support; thereof, filed.
143	Dec. 27	Plff's memorandum in opposition to motion for protective order re deposition of C. E. Parker, filed.
144	Dec. 30	Response of Kaiser Aluminum & chemical Sales, Inc. to plff's requests for admissions, filed.
145	Dec. 30	Response of Kaiser Aluminum & Chemical Corp. to plff's requests for admissions, filed.
	1977	
146	Jan. 4	Supplemental answer of plff to deft's expert interrogatories, filed.
147	Jan. 7	Deft's notice of deposition of Ellis Veiser et al, filed.
148	Jan. 17	Supplemental answers of Kaiser Defts to plff's interrogatories re: Expert Testimony, filed.
149	Jan. 18	Plff's motion for protective order re: depositions of Ellis Viezer and Roy Elam, notice and memorandum of law in support, filed.
150	Jan. 18	Plff's notice of deposition of Carlos Chafin, filed.
151	Jan. 21	Answers of deft, Kennedy Culvert & Supply

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1977		
		Co. to plff's interrogatories — First Set, filed.
152	Jan. 26	ORDER that this action is removed from the Feb. Trial list and placed on the March list: a further pretrial conference will be held on 3-9-77 at 9:15 a.m.; trial briefs and written requests for instructions to the jury shall be filed by 3-7-77; discovery is reopened and shall conclude on 3-1-77; plff may take the further deposition of C. E. Parker, etc. and Kennedy Culvert & Supply Corp.'s Rule 37 motions are Granted, etc., filed. EC 1-27-77 entered and copies mailed.
153	Feb. 3	Plff's notice of deposition of Dr. Horace I. DePodwin, et al, filed.
154	Feb. 16	Deft, Kennedy Culvert & Supply Co., Inc.'s notice of deposition of Richard Sullivan, filed.
155	Feb. 16	Deft, Kennedy Culvert & Supply Co., Inc.'s notice of deposition of Clifford Rossignol, filed.
156	Feb. 16	Defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc.'s notice of deposition of the Monarch Machine Tool, Co. by Urban Buschur, filed.
157	Feb. 22	Plff's notice of deposition of Thomas Melrose, filed.
158	Feb. 23	Plff's notice of deposition of Urban Buschur, filed.
159	Feb. 25	Motion of Plff. for Protective Order re: Depositions of Richard Sullivan and Clifford Rossignol, Notice of, Notice of, Memorandum of Law in support thereof, filed.
160	Feb. 28	Stipulation and Order that transcript of testimony of any employee of U.S Economic

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1977		
		Development Administration, etc. shall be designate "CONFIDENTIAL MATERIALS, filed. 3/1/77 entered.
161	Feb. 28	ORDER AMENDING paragraph 2 of the Order filed on 1/26/77 etc., filed 3/1/77 Entered and Copies Mailed
162	Mar. 3	Plff's second suppl. answers to interrogatories, filed.
163	Mar. 8	Videotape deposition of Thomas Melrose, filed.
164	Mar. 8	Plff's notice of deposition of Ken Boedecker, et al, filed.
165	Mar. 15	Plff's trial brief, filed. (Filed under SEAL)
166	Mar. 17	Stipulation of counsel re: Confidentiality Order and ORDER re: the Confidentiality of certain documents, etc., filed. EC 3-17-77 entered and copies mailed.
167	Mar. 17	ORDER that following a PRETRIAL CONFERENCE on 3-11-77 all discovery shall be closed on 3-18-77, etc.; the trial shall be bifurcated with a trial on the issue of liability and a trial on the issue of damages: the parties shall select a jury on 4-11-77, etc., filed. EC 3-18-77 entered and copies mailed.
168	Mar. 18	Plff's notice of deposition of Ken Boedecker, filed.
169	Mar. 21	Plff's notice of deposition of Ken Boedecker, filed.
170	Mar. 21	Plff's preliminary requests for instructions to the jury, filed.
171	Mar. 21	Plff's third supplemental amended answer to

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1977		
		Kaiser Aluminum & Chemical corp.'s interrogatories #24, 27 and 28 re: Damages, etc., filed.
172	Mar. 22	Deposition of Carlos H. Chafin taken on behalf of plff, filed.
173	Mar. 28	Plff's motion for reconsideration of the Court's Order of 3-17-77 notice and memorandum of law in support, filed.
174	Apr. 1	Statement of facts of defts, R. A. Kennedy and Kennedy Culvert, filed.
175	Apr. 1	Motion of defts, Robert A. Kennedy and Kennedy Culvert & Supply Co. for partial summary judgment, filed.
176	Apr. 1	Memorandum of Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in opposition to plff's motion for reconsideration of the Court's Order of 3-17-77, filed.
177	Apr. 1	Trail brief of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc., filed.
178	Apr. 4	Plff's notice of deposition of Robert L. Price, filed.
179	Apr. 4	Plff's supplemental memorandum in support of motion for reconsideration of Order of 3-17-77, filed.
180	Apr. 5	Motion of Kaiser Aluminum & Chemical Corp. for a protective order, notice and memorandum of law in support, filed.
181	Apr. 5	Affidavit of Robert L. Price re: motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for partial summary judgment, filed.
182	Apr. 7	Videotape deposition of Ken Boedecker, filed.

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1977		
183	Apr. 7	Plff's supplemental answers to interrogatories dated 4-4-77, filed.
184	Apr. 7	Motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for partial summary judgment, notice, with memorandum of law and appendix in support, filed.
185	Apr 11	Memorandum of defts, Kais er Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in support of withdrawing from the jury the question of relevant product market with appendix, filed.
186	Apr 11	Plff's motion to strike affidavit of Robert L. Price, filed.
187	Apr 11	Plff's designation of genuine issues of material fact for trial with record support re: Kaiser motion for partial summary judgment, filed.
188	Apr 11	Deposition of Richard L. Sullivan, filed.
189	Apr 11	Deposition of Clifford J. Rossignol, filed.
190	Apr 11	Deposition of Holmes Collins, Three Volumes, filed.
191	Apr 11	Deposition (Videotape) of Thomas Melrose, filed.
192	Apr 11	Deposition of David C. Thomas, filed.
193	Apr 11	Deposition of James Caterina, filed.
194	Apr 11	Continuing deposition of Claron E. Parker on 2-23-77, filed.
195	Apr 12	CIVIL JURY TRIAL on 4-11-77: Jury called and sworn, filed. EC
196	Apr 12	Deposition of Joseph A. Bonjourno, filed.
197	Apr 13	Trial resumes on 4-12-77, filed. EC
199	Apr 13	Testimony of Joseph A. Bonjorno on 4-13-77, filed.

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	1977	
200	Apr 13	Deposition (Video) of Kenneth Boedecker, filed.
201	Apr 13	Copy of deposition of Robert A. Kennedy, filed.
202	Apr 13	Deposition of Philip C. Buchy, Jr., filed.
203	Apr 14	Trial resumes on 4-13-77 - - witnesses sworn, filed. EC
204	Apr 15	Trial resumes on 4-14-77, filed. EC
205	Apr 15	Deposition of Joseph A. Bonjorno, filed.
206	Apr 18	Affidavit of Lee Rosengard re service of subpoena on Edward Mackin on 4-14-77, etc. filed.
207	Apr 18	Affidavit of Lee Rosengard re service of subpoena on Julius J. Luchinsky on 4-14-77, etc., filed.
208	Apr 18	Affidavit of Deborah Dupler re service of subpoena on Frank E. Sagendorph, III, on 4-9-77, etc., filed.
209	Apr 18	Deposition of Richard L. Sullivan, filed.
210	Apr 19	Deposition of Frank Elijah Sagendorph, III, filed.
211	Apr 19	Trial resumes on 4-15-77, filed. EC
212	Apr 19	Trial resumes on 4-18-77, filed. EC
213	Apr 20	Trial resumes on 4-19-77, filed. EC
214	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Bart Flannery on 4-15-77, filed.
215	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Charles Gianusso on 4-15-77, filed.
216	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Ernest Lo Furno on 4-15-77,; filed
217	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Victor Pangia on 4-15-77, filed.
218	Apr 20	Affidavit of Lee Rosengard re: service of

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	1977	
		subpoena on R. W. Krauss on 4-15-77, filed.
219	Apr 20	Affidavit of Lee Rosengard re: service of subpoena on Martin Ettorre on 4-15-77, filed.
220	Apr 21	Trial resumes on 4-20-77, filed.
221	Apr 25	Trial resumes on 4-21-77, filed. EC
222	Apr 26	Trial resumes on 4-25-77, filed. EC
223	Apr 27	Trial resumes on 4-26-77, filed. EC
224	Apr 28	Motion of defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for a directed verdict pursuant to Rule 50(a), and memorandum of law in support, filed.
225	Apr 28	Trial resumes on 4-27-77, filed. EC
226	May 2	Transcript of testimony on 4-12-77, filed.
227	May 2	Transcript of testimony on 4-13-77, filed.
228	May 2	Transcript of testimony on 4-14-77, filed.
229	May 2	Transcript of testimony on 4-15-77, filed.
230	May 2	Transcript of testimony on 4-18-77, filed.
231	May 2	Transcript of testimony on 4-19-77, filed.
232	May 2	Transcript of testimony on 4-20-77, filed.
233	May 2	Transcript of testimony on 4-21-77, filed.
234	May 2	Transcript of testimony on 4-25-77, filed.
235	May 2	Transcript of testimony on 4-26-77, filed.
236	May 2	Transcript of testimony on 4-27-77, filed.
237	May 2	Transcript of testimony on 4-28-77, filed.
238	May 2	Trial resumes on 4-28-77, filed. EC
239	May 2	Trial resumes on 5-2-77 - - Rule 50 motion by defts is GRANTED and Judgment to be entered in favor of the defts and against the plff, filed. EC
240	May 2	ORDER that judgment is entered in favor of the defts, Kaiser Industries Corp. et al and against the plff, Columbia Metal Culvert Co., Inc., filed. EC.Clk

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1977		
		5-3-77 entered and copies mailed.
241	May 3	Transcript of 5-2-77, filed.
242	May 11	Defts, Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, INc.'s Bill of Costs with affidavit in support, filed.
243	May 12	Plff's objection to Bill of Costs, filed.
244	May 19	Defts, Robert A. Kennedy and Kennedy Culvert & Supply Co.'s Bill of Costs with affidavit in support, filed. (77-1846)
245	May 20	Plff's notice of appeal and certificate of service, filed.
		5-23-77 entered and copies to: USCA, C. Hodgson & Blank, Rome, Klaus and Comisky
246	May 20	Copy of Clerk's Notice of appeal to USCA, filed.
247	May 24	Plff's objections to Bill of Costs of defts Robert A. Kennedy and Kennedy Culver t & Supply Co., filed.
248	June 9	Deposition of Robert A. Kennedy on 5-7-75, filed.
--	June 9	Original record transmitted to USCA. Not including papers #43, 62, 63, 67, 97, 128, 199, 242, 243, 244, 247, (#49 and 198--no paper assigned), (#163 and 182--Video Tape Depositions). (Paper #165 is UNDER SEAL).
--	July 1	Bond for Costs on Appeal in the sum of $250 with Fidelity and Deposit Co. of Maryland as surety, filed.
249	July 20	MEMORANDUM OPINION, Cahn, J., filed. (22 pags.) EC
		7-21-77 entered and copies mailed.
--	July 22	Fir.t supplemental record transmitted to

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1977		
		USCA. (Record includes only paper #249)
250	Dec 28	Index to plff's trial exhibits, filed.
--	Dec 29	Second supplemental record transmitted to U.S.C.A. (Exhibits--Plff's Trial Exhibits #3, 4, 5, 8A, 10, 11, 13, 15, 16, 21, 22, 24, 30, 75, 76, 78, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 100, 101, 109, 110, 116, 117, 133, 139, 140, 143, 144, 145, 146, 151A, 152, 154, 155, 159, 160, 161, 162, 169, 170, 177, 179, 182, 182A, 184, 186, 188, 189, 194, 195, 199, 200, 201, 202, 203, 221, 222, 226, 227, 229, 257, 259, 263, 267A, 272A, 273, 274, 275, 276, 277, 278, 280, 281, 282, 283, 284, 287, 288, 549, 732G, 865, 916, 917, 924, 940, 947, 948, 950, 951, 954, 955, 956, 957, 962, 966 and 969: P-196, P-197, P-200, P-211, P-201, P-202, P-212, P-226, P-227, P-840, P-839, P-842, P-841, P-838, P-837, P-836, P-838B, P-2001, P-2002, P-2003 a & b, P-2006-2008, P-2009 a & b, P-2011-2013, P-2016, P-2018, P-2021, P-2028, P-2030, P-2031A, P-2032, P-2033, P-2034, P-2035, P-272, P-272 a, b & c, P-288, P-823, P-230, P-262, P-264, P-268, P-290, P-2036, P-2036A, P-2037 and P-2038.)
1978		
251	Mar 21	Certified copy of Order from U.S. Court of Appeals GRANTING appellant's motion for leave to the District Court to correct the record in accordance with Rule 60(a), by changing Mr. Arvay's answer on page 1550 of the trial transcript from "Yes, really," to "Yes, rarely." filed.
252	July 7	Certified copy of Order U.S. Ct. Appeals,

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		dated 7/6/78 that motion of appellant Columbia Metal Culvert Co., Inc. for reconsideration and vacation or modification of the Order of 6/29/78 et al., is denied, filed.
253	Jul 26	Plff's Motion for Pretrial Conference & for Preliminary Injunction, Notice, & Memorandum in support of both Motions, filed.
254	Jul 26	Deft's Memorandum in opposition to Plff's Motions, filed.
255	Aug 4	Affidavit of William H. Roberts, filed.
--	Oct 12	ORIGINAL RECORD and 2 supplements returned; Trial Transcript Nos. 227, 229, 230, 235 & 236, plft's. exhibits marked P-288 and impounded document No. 165 will be returned when they are received back from U.S. Supreme Court; petition for certiorari was denied 10/2/78.
256	Oct 12	Certified copy of ORDER that the judgment of the district court filed 5/2/77 is affirmed as to defts. Kennedy Culvert and Robert Kennedy; as to KACC and KACSI, judgment of the District Court is affirmed insofar as it granted a directed verdict against plfts. on the Clayton Act claims; the remainder of said judgment of the District Court is reversed, and the cause remanded for action consistent with the opinion of the U.S. Court of Appeals, filed. USCA
--	Oct 18	Trial transcripts Nos. 227, 229, 230, 235 and 236, plft's. exhibits marked P-288 and impounded document No. 165 received from U.S. Court of Appeals.
257	Oct 20	ORDER, that the case be reassigned from the calendar of Judge Edward N. Cahn to the calendar of Judge Norma L. Shapiro,

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		filed. JL/clk 10/20/78 entered & copies mailed
258	Oct 20	Plft's. supplemental rule 34 request for production of documents, filed.
259	Oct 20	Plft's. renewed motion for pretrial conference, notice, renewed motion for preliminary injunction, memorandum, filed.
260	Oct 20	ORDER that case be reassigned from the calendar of Judge Edward N. Cahn to the calendar of Judge Norma L. Shapiro, filed. JS/mek 10/23/78 entered & copies mailed.
261	Oct 24	Memorandum of Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in opposition to plft's. meotion for a preliminary injunction, filed.
262	Oct 26	Plft's. reply brief, filed.
263	Nov 7	Plft's. supplemental brief, with affidavit of Joseph A. Bonjorno, filed.
264	Nov 9	Report of pretrial conference, Shapiro, J.
--	Nov 9	PRETRIAL CONFERENCE HELD, Shapiro, J.
265	Nov 10	ORDER, dated 11/10/78 that discovery shall be completed by 1/31/79; plft. has leave to file an amended or supplemental complaint, etc., parties shall be ready for pretrial conference and preliminary injunction argument 12/21/78 at 11 AM, Rm. 10614, etc., filed. NS 11/13/78 entered & copies mailed.
266	Dec 7	SECOND AMENDED AND SUPPLEMENTAL COMPLAINT, filed.
267	Dec 19	Defts' notice of deposition of Joseph A. Bonjorno, et al., filed.
268	Dec 21	Deft's. supplemental request for production

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		of documents, set No. 1, filed.
269	Dec 21	Plft's. notice of deposition of Custodian of Records of Reynolds Metals Co., filed.
270	Dec 21	Plft's. notice of deposition of Walter R. Haidet, et al., filed.
271	Dec 21	Plft's. notice of deposition of Custodian of Records of Kennedy Culvert & Supply Co., filed.
272	Dec 27	Report of Pretrial conference of 12/21/78, filed.
273	Dec 28	STIPULATION AND ORDER DATED 12/21/78 THAT THE TIME IN WHICH DEFTS. MAY ANSWER, MOVE OR OTHERWISE RESPOND TO THE SECOND AMENDED COMPLAINT IS EXTENDED UNTIL 1/7/79, FILED. 12/28/78 entered and copies mailed
274	Dec 28	ORDER THAT A STATUS/SETTLEMENT CONFERENCE WILL BE HELD ON 2/5/79 AT 4:30 PM. PLFF'S MOTION FOR PRELIMINARY INJUNCTION IS WITHDRAWN, PLFF. WILL PROVIDE THE COURT AND OPPOSING COUNSEL WITH INFORMATION ON DAMAGES BY 1/31/79. THE COURTS ORDER OF 11/10/78 is modified in that trial is scheduled for 6/5/79 OR SOONER IF POSSIBLE, FILED. NS 12/29/78 entered and copies mailed
1979		
275	Jan 5	ANSWER of defts. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. to second amended and supplemental complaint, filed.

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276	Jan 5	Defts' notice of deposition of William Bowman, et al., filed.
277	Jan 9	Plft's. amended notice of deposition of Mr. Carlos Chafin, filed.
278	Jan 17	Plft's. notice of deposition of Francis Lombardi, filed.
279	Jan 17	Plft's. notice of deposition of Robert Kennedy, filed.
280	Jan 25	Plft's. response to defts' supplemental request for production of documents – set #1, filed.
281	Jan 25	Stipulation between counsel for plft. and defts. that documents produced by Kennedy Culbert & Supply Co. from 1/15/79 thru the final termination of the action are produced subject to stipulation of confidentiality heretofore executed (Docket No. 40), etc., filed.
282	Jan 30	Defts' supplemental interrogatories, Set No. 1.
283	Jan 31	Defts' supplemental request for production of documents, set No. 2, filed.
284	Jan 31	Plft's. damages statement, filed.
285	Feb 2	Plft's. supplemental request for documents, filed.
286	Feb 2	Plft's. amended damages statement (Feb. 1, 1979), filed.
287	Feb 7	Plft's. objection to deft's. supplemental interrogatories, set No. 1, filed.
~~288~~	~~Feb 14~~	~~PLFT'S. MOTION FOR ORDER COMPELLING DEFTS. TO PRODUCE DOCUMENTS, NOTICE, MEMORANDUM, filed.~~ (see Paper #293)

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289	Feb 14	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION FOR AN ORDER COMPELLING DEFTS. TO PRODUCE DOCUMENTS, filed.
290	Feb 20	Plft's. memorandum in opposition to bill of costs of Robert A. Kennedy and Kennedy Culvert & Supply Co., filed.
291	Feb 22	Report of pretrial conference, Shapiro, J., filed.
--	Feb 22	PRETRIAL CONFERENCE HELD 2/15/79, Shapiro, J.
292	Feb 23	ORDER, DATED 2/22/79, THAT DISCOVERY SHALL BE COMPLETED BY 3/15/79, ETC., FINAL PRETRIAL CONFERENCE TO BE HELD 4/20/79 at 4:30 PM, ETC., filed. NS 2/23/79 entered & copies mailed.
293	Feb 23	ORDER, DATED 2/22/79, THAT MOTION, DOCKET #288 SHALL BE STRICKEN AND RETAINED UNDER SEAL, ETC., filed. NS 2/23/69 entered & copies mailed.
294	Feb 27	Letter dated 2/21/79 to Chief Deputy Clerk, Mr. Kunz, from Lee A. Rosengard Esq Re: Taxation of costs, etc., filed
295	Feb 27	Letter dated 2/26/79 to Chief Deputy Clerk, Mr. Kunz, from Michael M. Baylson Esq., re: Taxation of Costs, etc., filed.
296	Feb 28	Defts' notice of deposition of Howmet Aluminum Corp., filed.
297	Mar 1	Plft's. notice of deposition of Custodian of Records of Reynolds Metals Co., filed.
298	Mar 5	KAISER ALUMINUM & CHEMICAL

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		CORP., ET AL'S. MOTION FOR AN ORDER COMPELLING ANSWERS TO INTERROGATORIES AND COMPELLING PRODUCTION OF DOCUMENTS, NOTICE, MEMORANDUM, filed.
299	Mar 9	PLFT'S. MEMORANDUM IN OPPOSITION TO DEFT'S. MOTION FOR ORDER COMPELLING ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS, filed.
300	Apr 20	Report of pretrial conference, Shapiro, J., filed.
--	Apr 20	PRETRIAL CONFERENCE HELD, Shapiro, J.
301	Apr 26	ORDER DATED 4/24/79 THAT COUNSEL FOR PLFT. SHALL DESIGNATE PAGES OF DEPOSITIONS HE INTENDS TO OFFER AT TRIAL BY 6/1/79, ETC., A STATUS CONFERENCE WILL BE HELD 6/4/79 at 4 PM, filed. NS 4/27/79 entered & copies mailed.
302	May 17	PLFF'S MOTION FOR ORDER COMPELLING DISCOVERY, NOTICE, MEMORANDUM FILED.
303	May 17	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION TO TAKE DEPOSITIONS OF EXPERT WITNESSES, filed.
304	May 25	Plft's. answer to defts' supplemental interrogatory #1, filed (UNDER SEAL) (placed in lockup)
305	May 30	PLFT'S. REPLY BRIEF IN SUPPORT OF MOTION FOR ORDER COMPELLING DISCOVERY (DEFTS' EXPERTS), filed.
306	June 1	Plft's. designation of deposition testimony for

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		use at trial, filed.
307	June 6	ORDER, DATED 6/5/79 THAT PLFT'S. MOTION TO DEPOSE DEFTS' EXPERT WITNESSES WITHOUT COSTS IS DENIED; DEFTS. ARE ORDERED TO SUPPLEMENT THEIR ANSWERS TO PLFT'S. EXPERT INTERROGATORIES., ETC., THE COURT WILL HOLD A PRETRIAL CONFERENCE ON 7/5/79 at 9:30 A.M., ETC., filed. 6/7/79 entered & copies mailed.
308	June 7	Report of pretrial conference, Shapiro, J., filed.
--	June 7	PRETRIAL CONFERENCE HELD 6/4/79, Shapiro, J.
309	June 8	Plft's. notice of depositions of James Hobby, et al., filed.
310	June 15	Deposition of David C. Jones, filed.
311	June 29	Plft's. supplemental designations of deposition testimony, filed.
312	June 29	Defts' counter-designation of testimony for use at trial, filed.
313	July 3	Defts' supplemental designation of deposition testimony for use at trial, filed.
314	July 5	Plft's. motion for sanctions, filed.
315	July 5	Plft's. proposed questions on voir dire, filed.
316	July 5	Plft's. proposed interrogatories to jury, filed.
317	July 5	Plft's. supplement to second final pretrial order, filed.
318	July 5	Plft's. preliminary requests for instructions to the jury, filed
319	July 5	Plft's. supplemental trial brief, filed.
320	July 6	Deft's Kaiser Aluminum & Chemical Corp., et al's requested jury instructions, filed.
321	July 6	Supplemental answers of Kaiser Deft's to

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		plff's interrogatories re: expert testimony, filed.
322	July 6	Preliminary proposed form of special verdict of deft's Kaiser Aluminum & Chemical Corp., et al, filed.
323	July 12	PLFT'S. MOTION FOR PRECLUSION ORDER OR OTHER SANCTIONS, NOTICE, MEMORANDUM, filed.
324	July 13	Plft's. amended damage statement 7/13/79, filed.
325	July 13	Plft's. tentative order of witnesses, filed.
326	July 13	DEFTS' MEMORANDUM IN OPPOSITION TO PLFT'S. MOTION FOR PRECLUSION ORDER AND OTHER SANCTIONS, filed.
327	Jul 13	DEFTS' KAISER ALUMINUM & CHEMICAL CO. MOTION IN LIMINE & MEMORANDUM IN SUPPORT, filed
328	Jul 13	DEFTS " witnesses, filed
329	Jul 13	CLERK'S TAXATION OF COSTS, RE THAT JUDGMENT IS ENTERED IN FAVOR OF DEFTS' ROBERT A. KENNDEY AND KENNEDY CULVERT & SUPPLY CO. AND AGAINST THE PLFF. COLUMBIA METAL CULVERT IN THE AMOUNT OF $4,647.64, filed MEK 7/16/79 entered & copies mailed
330	Jul 16	Deposition of James B. Hobby, filed
331	Jul 17	PLFF'S MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS & MEMORANDUM OF LAW, filed
332	Jul 17	Plff's notice of taking deposition of Barbara Epstein, filed

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333	Jul 17	Additional plff's exhibits re; William Arvay, filed
334	Jul 17	Plff's objections to counter-designations by deft. H.T. Collins testimony, filed
335	Jul 17	Plff's memorandum of law, filed
--	Jul 5	Report of pre-trial conference, SHAPIRO, J.
336	Jul 18	PRE-TRIAL CONFERENCE, SHAPIRO, J, filed
337	Jul 18	CIVIL JURY TRIAL, jury called & sworn on 7/17/79, on issue of liability – bifurcated, filed NS
338	Jul 19	Oral deposition of Robert A. Kennedy, filed.
339	Jul 19	Deposition of Kenneth Richard Lally, filed.
340	Jul 19	Deposition of Walter R. Haidet, filed.
341	Jul 19	Deposition of Allan J. Donald, filed.
342	Jul 19	Deposition of Francis T. Lombardi, filed.
343	Jul 19	TRIAL RESUMES 7/18/79, filed.
344	Jul 19	COLUMBIA METAL CULVERT CO., INC.'S. MOTION TO VACATE CLERK'S TAXATION OF COSTS AND FOR A DE NOVO REVIEW OF THE BILL OF COSTS BY THE COURT, filed.
345	Jul 19	Deposition of Carol Herman, filed.
346	Jul 19	Deposition of Carlos H. Chafin, filed.
347.	Jul 20	TRIAL RESUMES ON 7/19/79: Witness continues, filed. (NS)
348.	Jul 20	TRIAL RESUMES ON 7/20/79: Witness continues, filed. (NS)
349	Jul 25	Plff's supplemental designation, counter designation of deposition testimony and objections to designations, filed.
350	Jul 25	TRIAL RESUMES ON 7/23/79, witnesses sworn, trial continues, filed (NS)
351	Jul 26	TRIAL RESUMES 7/24/79, filed.

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352	Jul 26	PLFF'S MOTION FOR ORDER TO PRODUCE DOCUMENTS & MEMORANDUM OF LAW, filed
353	Jul 27	Praecipe for writ of execution as to Kaiser Aluminum & Chemical Corp et al, filed
–	Jul 27	Writ Exit.
354	Jul 27	MOTION AND ORDER SPECIALLY APPOINTING C. CLARK HODGSON TO SERVE WRIT, FILED. 7/27/79 entered & copies with writ to counsel MEK-CLK
355	Jul 27	Interrogatories in attachment to Kaiser Aluminum & Chemical Corp et al, filed.
356	Jul 27	TRIAL RESUMES, witnesses sworn 7/25/79, filed
357	Jul 30	TRIAL RESUMES, trisl continued as of 7/26/79, filed
358	Jul 30	Deft. Kaiser Alum. & CHemical Corp.'s reply to plff's supplemental trial brief, filed
359	Jul 31	TRIAL RESUMES, witnesses sworn on 7/27/79, filed
360	Aug 1	Memorandum of law of Kaiser Aluminum & Chemical Corp et al regarding Alleged Dam filed
361	Aug 1	Trial of 7/30/79 resumes, filed.
362	Aug 1	Trial of 7/31/79 resumes, filed.
363	Aug 2	MOTION OF KAISER ALUMINUM ET AL FOR A DIRECTED VERDICT PURSUANT TO RULE 50(a), FILED
--	Aug 1	SETTLEMENT CONFERENCE, Shapiro, J.
364	Aug 2	Report of settlement conference, Shapiro, J., filed
365	Aug 3	Trial of 8-1-79 resumes filed.
366	Aug 6	Plff's memorandum in support of motion to

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		exclude defts' exhibits D-3049 thru D-3060 filed.
367	Aug 7	Trial of 8/2/79 resumes, filed.
368	Aug 7	Trial of 8/3/79 resumes, filed.
369	Aug 9	Trial of 8/6/79 resumes filed.
370	Aug 9	Trial of 8/6/79 resumes filed.
371	Aug 9	Defts' memorandum in opposition to request to exclude certain exhibit filed.
372	Aug 10	Trial of 8/8/79 resumes, filed.
373	Aug 13	Kaiser Aluminum & Chemical Corp et al supplemental requests for Jury instructions, filed.
374	Aug 14	Trial of 8/9/79 resumes, filed.
375	Aug 14	Trial of 8/10/79 resumes, filed.
376	Aug 14	Trial of 8/13/79 resumes, filed.
377	Aug 14	Plff's supplemental points for charge — Liabiltiy, filed.
378	Aug 16	Trial resumes on 8-14-79, filed.
379	Aug 16	Trial resumes on 8-15-79, filed.
380	Aug 16	ORDER DATED 8-16-79 THAT THE U.S. MARSHAL FURNISH LUNCH FOR 11 JURORS AND ONE DEPUTY MARSHAL, FILED. NS.Clk 8-17-79 entered
381	Aug 17	Plff's supplemental points and authorities re: Damages, filed.
382	Aug 17	Plff's supplemental points for charge — Damages, filed.
383	Aug 17	Interrogatories to the jury filed.
384	Aug 17	Jury trial resumes (8/16/79); Deputy Marshal sworn; verdict by answering interrogatories in favor of pltf; trial on issue of damages to be held on 8/17/79, filed.
385	Aug 22	Trial resumes (7/20/79), filed.
386	Aug 22	Trial resumes & 7/21/79); deputy marshal sworn; verdict on damages by answering interrogatories, filed.

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387	Aug 22	Trial resumes (8/17/79), filed.
388	Aug 22	Interrogatories to the jury, filed.
389	Aug 22	ORDER DATED 8/21/79 THAT POST-TRIAL MOTIONS ARE TO BE FILED WITHIN 10 DAYS AFTER ENTRY OF JUDGMENT; THAT MEMORANDUMS OF LAW IN OPPOSITION TO POST-TRIAL MOTIONS MUST BE SERVED & FILED WITHIN 5 DAYS OF SERVICE & FILING OF THE MOVING PARTY'S MEMORANDUM, FILED 8/22/79 entered and copies mailed. NS
390	Aug 22	JUDGMENT DATED 8/21/79 IN FAVOR OF PLTF AND AGAINST DEFTS, KAISER ALUMINUM AND CHEMICAL CORP. & KAISER ALUMINUM & CHEMICAL SALES, INC. IN THE SUM OF $5,445,000.00, FILED. Clk. NS 8/22/79 entered and copies mailed.
391	Aug 27	STIPULATION & ORDER EXTENDING TIME FOR DEFTS TO FILE POST TRIAL MOTIONS & BRIEFS TO 9/19/79, ETC., FILED. NS 8/28/79 entered & copies mailed.
392	Sept 6	Defts' requested jury instructions, filed.
393	Sept 19	DEFTS' MOTION FOR A NEW TRIAL, FILED.
394	Sept 19	DEFTS' MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT, FILED.
395	Sept 20	Deft.'s notice of appeal received 9/20/79 at 2:30 p.m., filed. 9/21/79 copies to:

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		Michael M. Baylson, Esq. Henry T. Reath, Esq. Blank, Rome, Klaus & Cominsky certified copy of docket entries & notice of appeal to U.S.C.A.
--	Sept 20	Bond for costs on appeal in the sum of $250.00 with the Fidelity & Deposit Company of Maryland, filed.
396	Sept 20	Copy of Clerk's notice to U.S.C.A., filed. 9/21/79 copies to: Michael M. Baylson, Esq. Henry T. Reath, Esq. Blank, Rome, Klaus & Cominsky Judge Shapiro Paul Buttery Daniel Spitz
397	Sept 28	DEFTS' MOTION FOR EXTENSION OF TIME FOR TRANSMISSION OF RECORD, FILED.
398	Oct 3	Response of Plff. to motion for new trial and for a judgment notwithstanding the verdict, filed.
399-418	Oct 4	Trial transcripts, 20 volumes, filed.
419-422	Oct 5	Trial transcripts, 4 volumes, filed.
--	Oct 9	ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (Pleadings #43, 62, 63, 67, 165, 199, 235, 260, 274, 293, 304, 330, 340, 341, 342, 389, 393, 394, 397 & 398 not included) (USCA 79-2389)
423	Oct 9	ORDER DATED 10/5/79 THAT DEFTS' MOTION FOR EXTENSION OF TIME FOR TRANSMISSION OF RECORD IS DENIED WITHOUT PREJUDICE, FILED. NS 10/10/79 entered & copies mailed.

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424	Oct 9	Kaiser's reply to Columbia's response to post-trial motions, filed.
425	Nov 14	DEFTS' MOTION FOR SUPERSEDEAS BOND, FILED.
---	Nov 16	Supersedeas bond in the sum of $5,445,000.00 with the Insurance Company of America as surety, with court approval, filed.
(425)	Nov 19	ORDER APPROVING SUPERSEDEAS BOND, FILED. 11/20/79 ENTERED & COPIES MAILED
426	Nov 20	CERTIFIED COPY OF ORDER FROM U.S.C.A. THAT APPELLANTS' MOTION FOR A LIMITED REMAND TO U.S.D.C. JUDGE SHAPIRO FOR THE PURPOSE OF DETERMINING KAISER'S MOTION FOR JUDGMENT NOT WITHSTANDING VERDICT AND MOTION FOR NEW TRIAL FILED BY KAISER, ETC., IS GRANTED., FILED. USCA
--	Nov 20	RECORD ON APPEAL RETURNED.
427	Dec 7	ORDER DATED 12/6/79 THAT DEFTS' BRIEF IN SUPPORT OF POSTTRIAL MOTIONS SHALL BE FILED BY 1/3/80, ETC., FILED. 12/10/79 entered & copies mailed. NS
428	Dec 26	ORDER THAT THE COURT HEREBY RETAXES A JUDGMENT FOR COSTS IN FAVOR OF DEFTS., ROBER A. KEENDY AND KENNEDY CULVERT & SUPPLY COMPANY AND AGAINST PLFF., COLUMBIA METAL CULVERT CO., INC. IN THE SUM OF $4,647.64, filed. 12/27/79 entered & copies mailed. NS

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429	Dec 27	Defts' brief in support of motions for judgment N.O.V. or for a new trial, filed.
1980		
430	Jan 3	ORDER THAT THE ORDER OF DECEMBER 6, 1979, SETTING FORTH A BRIEFING SCHEDULE FOR DEFTS' POST TRIAL MOTIONS, IS MODIFIED IN THAT PLFF'S BRIEF IN OPPOSITION TO DEFTS' POST TRIAL MOTIONS SHALL BE FILED AND SERVED ON OR BEFORE JAN. 18, 1980, AND DEFTS SHALL HAVE TEN (10) DAYS TO FILE AND SERVE A REPLY BRIEF. ORAL ARGUMENT IS SCHEDULED FOR FEB. 27, 1980 AT 4:00 P.M. AS PREVIOUSLY ORDERED, FILED NS 1/3/80 ENTERED & COPIES MAILED
431	Jan 18	Plff's brief in opposition to defts' motions for judgment N.O.V. or for a new trial, filed.
432	Jan 21	Transcript of 8/15/79, filed.
433	Jan 21	Transcript of 8/16/79, filed.
434	Jan 21	Transcript of 8/21/79, filed.
435	Feb 1	Defts' reply brief in support of motions for judgment N.O.V. or for a new trial, filed.
436	May 2	Transcript of 7/20/79, filed.
437	May 12	PLFF'S MOTION FOR SUBSTITUTION OF PARTIES, NOTICE, MEMORANDUM OF LAW FILED.
(437)	May 30	ORDER THAT UPON THE LIQUIDATION AND DISSOLUTION OF COLUMBIA METAL CULVERT CO., INC. JOSEPH A. BONJORNO, GEORGE M. KERR, JR. AND BARBARA K. CLISBY WILL BE SUBSTITUTED AS PARTIES PLFF. IN PLACE OF COLUMBIA

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-		METAL CULVERT CO., INC., ETC., FILED. 6/2/80 entered & copies mailed. NS
438	Jul 25	Writ returned with affidavit of C. Clark Hodgson, Jr., Esq., re: mailed on 8-7-80, filed.
439	Dec 2	ORDER DTD. 12/1/80 THAT A SUPPLEMENTAL ORAL ARGUMENT ON OUTSTANDING MOTIONS WILL BE HELD ON 1/29/81 AT 9:00 A.M, FILED. NS 12/3/80 entered & copies mailed.
440	Dec 5	ORDER THAT ORAL ARGUMENT ON OUTSTANDING MOTIONS SCHEDULED FOR 1/29/81 HAS BEEN CHANGED TO 12/29/80 AT 10:00 A.M. IN CTRM. 10-A, FILED. 12/8/80 entered & copies mailed. NS/clk
441	Dec 23	Pltf's statement of issues for supplemental oral argument, filed.
442	Dec 23	Pltf's appendix to statement of issues for oral argument, filed.
443	Dec 24	Pltf's statement of issues for supplemental oral argument, filed. (revised)
444	Dec 30	ORAL ARGUMENT 12/29/80 SUR: C.A.V., filed.
445	Dec 30	Defts Kennedy & Robert A. Kennedy & Culvery & Supply Co.'s notice of deposition of Joseph A. Bonjorno, filed.
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446	Jan 6	PLTF'S MOTION FOR PROTECTIVE ORDER, NOTICE, MEMORANDUM OF LAW, FILED.
447	Jan 7	Defts' memorandum of law in opposition to pltfs' motion for a protective order,

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448	Jan 13	Pltfs' reply brief in support of Motion for protective order, filed.
449	Jan 21	Pltf, Joseph Bonjorno's objections to request for production of documents attached to notice of deposition, filed.
450	Jan 22	ORDER THAT A CONF. IS SCHEDULEF FOR 2/13/81 AT 9:30 a.m. IN CHAMBERS, FILED. NS/clk 1/22/81 entered & copies mailed.
451	Jan 23	ORDER THAT THE CONF. SCHEDULEF FOR 2/13/81 HAS BEEN CHANGED TO 2/5/81 AT 10:00 a.m. IN CHAMBERS, FILED. NS/clk 1/26/81 entered & copies mailed.
452	May 22	PLFFS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, NOTICE OF, MEMORANDUM OF, LAW, FILED. (SUPPLEMENTAL BRIEF ATTACHED)
453	may 29	Defts' answer to Motion for Leave to file Supplemental Brief re: J. Truett Payne v Chrysler Motors Corp., filed.
454	May 29	Defts' brief in answer to plffs' supplemental brief, filed.
455	Jun 18	MEMORANDUM, SHAPIRO, J., AND ORDER THAT PLFF'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF IS GRANTED, THE MOTION OF KAISER ALUMINUM & CHEMICAL CORP., ET AL FOR JUDGMENT N.O.V. IS GRANTED WITH RESPECT TO THE JURY AWARD OF $57,000 IN RESPONSE TO INTERROGATORY ONE AS TO DAMAGES AND OTHERWISE DENIED, DEFTS MOTION FOR A NEW TRIAL IS GRANTED AS TO DAMAGES ONLY,

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		FIXING 7-17-81 AT 1:00 P.M. FOR A PRE-TRIAL/STATUS CONFERENCE, ETC., FILED. 6-18-81 Entered and copies mailed.
456	Jun 18	ORDER THAT THE CLER OF THE DISTRICT COURT SHALL CERTIFY A COPY OF THE DOCKET ENTRIES TOGETHER WITH THE MEMORANDUM OF 6-17-81 TO THE CLERK OF THE COURT OF APPEALS, THE CLERK OF THE DISTRICT COURT SHALL RETAIN THE RECORD SUBJECT TO THE REQUEST OF THE COURT OF APPEALS PENDING A DECISION ON THE MOTION TO REVOKE LIMITED REMAND, FILED. 6-18-81 Entered and copies mailed.
---	Jun 18	Supplemental record on appeal transmitted to U.S. Court of Appeals
457	Jun 26	Certified copy of order received from U.S.C.A. DENYING THE MOTION OF APPELLEE, COLUMBIA METAL CULVERT CO., INC. TO SUBSTITUTE AS APPELLEES, JOSEPH A. BONJORNO ET AL ETC., FILED 6/29/81 ENTERED & COPY TO JUDGE SHAPIRO
458	Jun 29	PLFF'S MOTION FOR RECONSIDERATION, NOTICE, MEMORANDUM OF LAW, & CERTIFICATE OF SERVICE, FILED.
459	Jul 7	Kaiser's brief in opposition to Columbia's motion for reconsideration, filed.
460	Jul 13	CERTIFIED COPY OF ORDER OF USCA DENYING MOTION OF COLUMBIA

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1981		
		METAL CULVERT CO., INC. FOR RETURN OF THE FULL RECORD TO THIS COURT FOR DISPOSITION: GRANTING APPELLANTS MOTION FOR DISMISSAL OF APPEAL, FULL REMAND OF CASE TO DISTRICT JUDGE SHAPIRO WITH CERTAIN INSTRUCTION, AND STAY OF ANY ATTEMPTED EXECUTION BY COLUMBIA ON JUDGMENT BELOW ENTERED ON 8-22-79 IN FAVOR OF COLUMBIA AND AGAINST KAISER UNTIL COURT BELOW HAS ORDERED JUDGMENT OF 8-22-79 VACATED, FILED.
461	Jul 14	Reply brief in support of motion for reconsideration, filed.
462	Jul 16	ORDER VACATION JUDGMENT IN THE SUM OF $5,445,000.00 ENTERED 8-22-79 IN FAVOR OF COLUMBIA METAL CULVERT CO., INC. AND AGAINST KAISER ALUMINUM AND CHEMICAL CORP. AND KAISER AND CHEMICAL SALES, INC., FILED. 7/17/81 ENTERED AND COPIES MAILED.
463	Jul 17	Kaiser's preposed pre-trial procedure for retrial on damages, filed.
464	Jul 24	Plff's memo on procedure at retrial on damages, filed.
465	Jul 24	Plff's proposed statement, filed.
466	Jul 28	Kaiser's memo in opposition to plff's memo on procedure at retrial on damages, fil
467	Aug 6	ORDER THAT PLFF. SHALL SUBMIT STATEMENT ON DAMAGES ON OR BEFORE 8/17/81., DEFT. SHALL FILED

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1981		
		STATEMENT ON DAMAGES ON OR BEFORE 8/27/81., ETC., A PRETRIAL CONFERENCE WILL BE HELD ON 8/19/81 AT 10:00 A.M., FILED. 8/7/81 ENTERED AND COPIES MAILED.
468	Aug 10	PLFFS' MOTION TO WITHDRAW REQUEST FOR INTERLOCUTORY APPEAL, FILED.
469	Aug 31	ORDER THAT PLFFS. MOTION TO WITHDRAW INTERLOCUTORY APPEAL IS GRANTED, FILED. 8/31/81 ENTERED AND COPIES MAILED.
470	Sept 10	Plffs' Pre-Trial statement, re: damages, filed.
471	Sept 14	PLFFS' MOTION FOR PROTECTIVE ORDER, NOTICE, MEMO, FILED.
472	Sept 17	ORDER THAT CASE IS SPECIALLY LISTED FOR TRIAL ON 11/16/81 AT 10:00 A.M., FILED. 9/17/81 ENTERED AND COPIES MAILED.
473	Sept 18	Certificate of service of Michael M. Baylson, esq., re" service of Motion for protective order, filed.
474	Sept 21	Amendments to plffs' pre-trial statement, filed.
475	Oct 6	DEFTS MOTION FOR SUMMARY JUDGMENT AND FOR PRECLUSION OF PROOF OF DAMAGES, MEMO, CERTIFICATE, FILED.
476	Oct 6	PLFFS MOTION TO ADD ONE WITNESS TO PLFF'S WITNESS LIST, MEMO, CERTIFICATE OF SERVICE, FILED.

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1981		
477	Oct 9	Certificate of service of motion of defts for summary judgment, etc. filed.
478	Oct 13	Defts memo, in opposition to motion to add one witness to witness list, filed.
479	Oct 19	Plffs response to motion for summary judgment and for preclusion of proof of damages, filed.
480	Oct 19	Plffs reply brief in support of motion to add one witness to plffs witness list, filed.
481	Oct 19	Plffs offer of proof re: witnesses who have not previously testified, filed.
482	Oct 19	Defts pretrial statement re: damages, filed.
483	Oct 23	Defts' reply brief in support of motion for summary judgment and preclusion of proof, filed.
484	Nov 9	Plff's supplemental answers to interrogatories of Kennedy Culvert, first set, filed.
--	Nov 9	Plff's pre-trial statement-supplement 11-9-81, filed.
--	Nov 9	Plff's amended proposed statement of the case, filed.
485	Nov 12	Plff's trial brief, filed.
486	Nov 13	ORDER THAT PLFFS MAY AMEND THE DAMAGE COMPUTATION FILED 9-14-81 WITHOUT CHANGING THE THEORY OR METHODOLOGY, BY 9-21-81, ETC. PLFFS MOTION FOR PROTECTIVE ORDER FILED 9-14-81, IS GRANTED EXCEPT THAT: COURT RESERVES WHETHER DEFTS MAY DEPOSE HOWMET CORP., DEFTS SHALL SPECIFY THE PROPOSED DISCOVERY BY 9-28 & PLFFS SHALL RESPOND BY 10-5-81 EACH PARTY SHALL SUBMIT AN OFFER OF PROOF BY 10-19-81 AND THE

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1981		
		PARTIES MAY TAKE TELEPHONE DEPOSITIONS OF THESE WITNESSES PRIOR TO TRIAL: FINAL PRE-TRIAL CONFERENCE SAHLL BE HELD ON 11-12-81, ETC. TRIAL SHALL START 11-16-81, FILED. 11-13-81 Entered and Copies mailed.
487	Nov 13	Plff's Points for charge-damages, filed.
488	Nov 16	Jury Trial, jurors selected and sworn, filed.
489	Nov 18	Jury Trial, resumes, witnesses sworn, filed.
490	Nov 20	Jury Trial of 11-18-81, resumes, witnesses sworn, filed.
491	Nov 20	Jury Trial of 11-19-81, resumes, witnesses sworn, filed.
492	Nov 23	Jury Trial of 11-20-81, resumes, witnesses sworn, filed.
493	Nov 24	ORDER THAT PLFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER OF 6-18-81 GRANTING A RETRIAL AS TO DAMAGES ONLY IS DENIED. PLFF'S MOTION FOR A PROTECTIVE ORDER IS DENIES AS MOOT. PLFF'S MOTION TO ADD ONE WITNESS TO PLFF'S WITNESS LIST IS GRANTED. DEFT'S MOTION FOR SUMMARY JUDGMENT AND FOR PRECLUSION OF PROOF OF DAMAGES IS DENIED. ETC. FILED. 11-24-81 Entered and Copies mailed.
494	Nov 25	Jury trial 11/23/81 resumes, witnesses sworn, filed.
495	Nov 30	Jury Trial of 11-24-81 resumes, witnesses sworn, filed.
496	Nov 30	Transcript of testimony of 11-17-81, filed.
497	Nov 30	Transcript of testimony of 11-18-81, filed.

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	1981	
498	Nov 30	Transcript of testimony of 11-19-81, filed.
499	Nov 30	Transcript of testimony of 11-20-81, filed.
500	Nov 30	Transcript of testimony of 11-23-81, filed.
501	Nov 30	Transcript of testimony of 11-24-81, filed.
502	Dec. 1	Plff's memorandum of law, filed.
503	Dec. 1	Kaiser's memorandum regarding proposed rebuttal testimony by Dr. Spero, filed.
504	Dec. 2	ORDER THAT COFFEE BE FURNISHED 8 JURORS ENGAGED IN THE ABOVE ENTITLE CASE, FILED.
505	Dec. 2	ORDER THAT THE UNITED STATE MARSHAL BE AND HE IS HEREBY DIRECTED TO FURNISH LUNCH FOR 8 JURORS AND 1 DEPUTY UNITED STATES MARSHAL ENGAGED IN THE ABOVE ENTITLED CASE, FILED.
506	Dec. 2	Civil Jury Trial of 11-25-81 resumes, witnesses sworn, filed.
507	Dec. 2	Civil Jury Trial of 11-30-81 resumes, witnesses sworn, filed.
508	Dec. 2	Civil Jury Trial of 12-1-81 resumes, filed.
509	Dec. 2	Deposition of Lurier J. Fotrier, Jr., filed.
510	Dec. 2	Transcript of Hearing of 12-29-80, filed.
511	Dec. 2	Transcript of Hearing of 11-30-81, filed.
512	Dec. 2	Transcript of Hearing of 11-25-81, filed.
513	Dec. 2	Transcript of Hearing of 11-25-81, filed.
514	Dec. 2	Civil Jury Trial of 12-2-81, resumes, Verdict recorded, Judgment to be entered. filed.
515	Dec. 2	Interrogatories to the Jury, filed.
516	Dec. 2	ORDER POST-TRIAL MOTIONS, ARE TO BE SERVED AND FILED WITHIN 10 DAYS, ETC. ORAL ARGUMENT WILL BE HELD ON 1-29-82 AT 9:00 A.M., ETC. FILED.
		12-3-81 Entered and Copies mailed.

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	1981	
517	Dec. 2	ORDER THAT COFFEE BE FURNISHED 8 JURORS ENGAGED IN THE ABOVE ENTITLED CASE, FILED.
518	Dec. 4	ORDER THAT JUDGMENT BE AND THE SAME IS HEREBY ENTERED IN FAVOR OF JOSEPH A. BONJORNO, GEORGE M. KERR, JR. & BARBARA K. CLISBY, AS TRANSFERREES IN LIQUIDATION AND DISSOLUTION OF COLUMBIA METAL CULVERT CO., INC. AND AGAINST KAISER ALUMINUM AND CHEM. CORP. & KAISER ALUMINUM & CHEM. SALES, INC. IN THE SUM OF $9,567,939.00 FILED.
		12-4-81 Entered and Copies mailed.
519	Dec. 10	Plff's pre-trial Statement-Supplement 11-9-81, filed.
520	Dec. 10	Plff's amended proposed statement of the case, filed.
521	Dec. 14	Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. MOTION FOR JUDGMENT N.O.V. CERTIFICATE. FILED.
522	Dec. 14	KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. MOTION FOR A NEW TRIAL, CERTIFICATE. FILED.
523	Dec. 14	DEFT'S MOTION TO STAY EXECUTION OF THE JUDGMENT, MEMO, CERTIFICATE. FILED.
524	Dec. 28	ORDER THAT KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. SHALL HAVE AN EXTENSION OF TIME

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1981		
		TO SERVE AND FILE A MEMORANDUM OF LAW IN SUPPORT OF THEIR POST-TRIAL MOTION UNTIL DECEMBER 31, 1981, FILED.
		12-28-81 Entered and Copies mailed.
525	Dec. 31	Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. Brief in Suppor of Motion for Judgment N.O.V. and For a New Trial, filed.
526	Dec. 31	PLFFS MOTION FOR ATTORNEY'S FEES AND COSTS, BRIEF, FILED.
1982		
527	Jan. 5	Defts brief in Support of Motions for Judgment N.O.V. or for a New Trial Errata Sheet, filed.
528	Jan. 8	Plffs' Brief in Opposition to Defts Motions for Judgment N.O.V. for a New Trial-Damages Trial, certificate, filed.
529	Jan. 29	Transcript of Jury Trial of December 1, 1981, filed.
530	Jan. 29	Transcript of Jury Trial of December 2, 1981, filed.
531	Feb. 3	ORDER THAT COUNSEL FOR PLFFS SHALL FILE, ON OR BEFORE 2-26-82 SUPPLEMENTAL DOCUMENTS SUPPORTING THE MOTION FOR ATTORNEY'S FEES AND COSTS FILED 12-31-81: ETC. FILED.
		2-3-82 Entered and Copies mailed.
532	Feb. 25	PLFF'S REVISED MOTION FOR ATTORNEY'S FEES AND COSTS, CERTIFICATE, NOTICE, BRIEF, FILED.
533	Mar. 15	PLFF'S MOTION FOR POSTING OF SECURITY TO STAY EXECUTION OF

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1982		
		JUDGMENT, NOTICE, MEMO, CERTIFICATE, FILED.
534	Mar. 19	Defts' Kaiser's answer to motion for posting of security to stay execution of judgment, memo. of law, in support of motion to stay execution, filed.
535	Mar. 29	Defts' Memorandum in Opposition to Plffs' Revised Motion for Attorney's Fees and Costs, Certificate of Service, filed.
536	Mar. 29	Richard P. McElroy's Affidavit in Opposition to Plffs' Application for Award of Attorney's Fees, filed.
537	Apr. 8	Letter to the Honorable Norma L. Shapiro from Michael M. Baylson, Esq. re: Necessity for an Evidentiary Hearing, filed.
538	June 9	ORDER THAT ON OR BEFORE JUNE 19, 1982 THE PARTIES MAY FILE BRIEFS DISCUSSING RELEVANT DEVELOPMENTS IN THE LAW SINCE THE LAST ORAL ARGUMENT. ORAL ARGUMENT ON THESE BRIEFS WILL BE HELD ON JUNE 24, 1982, ETC. FILED.
		6/9/82 Entered and Copies mailed.
539	June 18	Defts' Supplemental Memorandum in Support of Motion for Judgment N.O.V. and for A New Trial, Certificate of Service, filed.
540	June 21	Plff's Supplemental Memo. in Opposition to Defts' Post-Trial Motions, filed.
541	June 24	Argued Sur: Hearing of 6/24/82 on Supplemental Post-Trial Memoranda, filed.
542	Dec. 10	PLFF'S. MOTION TO DISPOSE DEFT'S. POST-TRIAL MOTIONS WITHOUT FULL OPINION, MEMO, CERTIFICATE, NOTICE, FILED.

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1983		
543	Jan. 17	MEMORANDUM AND ORDER GRANTING DEFT'S MOTION FOR JUDGMENT N.O.V. WITH RESPECT TO JURY AWARD OF $1,638,793.00 IN RESPONSE TO INTERROGATORY #4 AND OTHERWISE DENIED. ALTERNATIVE MOTION FOR NEW TRIAL IS DENIED; JUDGMENT WILL BE ENTERED ON VERDICT OF JURY FOR $4,651,560.00, FILED. 1/18/82 Entered & Copies mailed.
544	Jan. 18	ORDER THAT PLFFS. RECOVER OF KASIER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC. THE AMOUNT OF $4,651,560.00 WITH INTEREST AND COSTS, FILED. 1/18/83 Entered & Copies mailed.
545-46	Jan. 18	Transcripts of testimony, filed (2 vols.).
547	Jan. 19	Plff's notice of appeal, filed. (83-1079) 1/20/83 copies to: U.S.C.A., Morris L. Weisberg, Esq.
548	Jan. 19	Copy of Clerk's notice to U.S.C.A., filed.
549	Jan. 24	Certified copy of order U.S.C.A. that petition for writ of mandamus is denied, filed.
550	Jan. 27	Deft's notice of appeal, filed. 1/28/83 copies to: U.S.C.A., Michael M. Baylson, Esq.
551	Jan. 27	Copy of Clerk's notice to U.S.C.A., filed.
552	Jan. 27	DEFT'S MOTION REQUESTING A BOND FOR COSTS ON APPEAL, MEMO, CERTIFICATE, FILED.
553	Jan. 27	DEFT'S MOTION FOR APPROVAL OF SUPERSEDEAS BOND, CERTIFICATE, FILED.

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1983		
(553)	Jan. 31	ORDER DATED 1-28-83 THAT EXECUTION TO ENFORCE JUDGMENT OF 1-18-83 BE STAYED; SUPERSEDEAS BOND IN THE AMOUNT OF $4,651,560.00 IS APPROVED, FILED. 2/1/83 Entered & Copies mailed.
--	Jan. 31	Supersedeas bond in the sum of $4,651,560.00 with Insurance Co. of North America as surety, filed. 2/1/83 Entered & Copies mailed.
554	FEB. 3	Copy of Transcript Purchase Order, filed.
--	FEB. 3	RECORD COMPLETE FOR PURPOSES OF APPEAL.
555	FEB. 3	Copy of Appellant's transcript purchase order, filed.
556	FEB. 17	Plff's response to motions concerning bond on appeal, filed.
557	FEB. 18	Certificate of Service by Michael M. Baylson re: served copy of plff's response to motions concerning bond on appeal to Richard P. McElroy, Esq. on 2-17-83, filed.
558	Mar. 15	Receipts re: return of exhibits 2001, filed.
559	Mar. 15	Plff's supplemental points for charges as to damages, filed.
560	Mar. 16	MEMORANDUM & ORDER THAT PLFFS. SHALL FILE A BOND OR OTHER SECURITY IN THE AMOUNT OF $2,500.00 WITHIN 30 DAYS; DEFTS. SHALL INCREASE THE SUPERSEDEAS BOND PREVIOUSLY APPROVED BY THE COURT IN THE AMOUNT OF $2,500.00 WITHIN 30 DAYS, FILED. 3/17/83 Entered & Copies mailed.
561	Mar. 25	Transcripts of telephone conference 1-28-83, filed.

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562	Mar. 28	PLFF'S MOTION FOR RECONSIDERATION OF ORDER DATED 3-16-83, MEMO, CERTIFICATE, FILED.
563	Apr. 18	Receipt re: return of exhibits D-1325-D1387 (Vol. 12), filed.
564	Apr. 19	ORDER THAT THE COURT'S ORDER OF 3-16-83 IS STAYED PENDING DECISION ON PLFF'S MOTION FOR RECONSIDERATION, FILED. 4/20/83 Entered & Copies mailed.
565	Apr. 22	Letter dated 4-22-83 by Alexander D. Bono re: return of Exhibits D-1325 - 1387, volume 12, filed.
566	Apr. 28	ORDER THAT PLFFS' MOTION FOR RECONSIDERATION IS DENIED, FILED 4/28/83 entered & copies mailed
--	May 6	Plff's bond for costs on appeal in the sum of $250,000.00 with the Fidelity and Deposit Co. of Maryland, as surety, filed.
567.	May 12	MOTION OF DEFTS, KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC., FOR RELEASE OF SUPERSEADEAS BOND APPROVED BY ORDER ENTERED 3/17/83; & ORDER DD. 5/12/83 INSTRUCTING THE CLERK OF THE DISTRICT COURT TO RELEASE TO R. P. McELROY, ESQ. OR A. D. BONO, ESQ. (DEFTS' COUNSEL) THE SUPERSEDEAS BOND IN THE AMOUNT OF $4,651,560.00, WHICH IS FOUND IN THE RECORD AT DOCKET NO. 553, ETC., FILED. (5/13/83 entered & copies mailed.) (NS)

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-	May 12	BOND RETURNED TO DEFTS' COUNSEL on 5/12/83.
--	May 12	Deft Supersedeas Bond in the sum of $4,654,060.00, with Insurance Company of North America as surety, filed. 5/13/83 entered & copies mailed. (NS)
568	July 5	PLFF'S SUPPLEMENTAL MOTION FOR ATTYS. FEES AND COSTS AND FOR RELATED DISCOVERY, MEMO, CERTIFICATE, FILED.
569	July 11	Deft's memorandum in opposition to plff's supplemental motion for atty's. fees and costs and for related discovery, filed.
1985		
570	Jan. 16	PLFFS' MOTION FOR ORDER INCREASING BOND, MEMO, CERT OF SERVICE, FILED.
571	Jan. 17	PLFFS' AMENDED MOTION FOR ORDER INCREASING BOND, MEMO, CERT OF SERVICE, FILED.
572	Feb. 1	Defts' response opposing amended motion for order increasing bond, memo, cert of service, filed.
573	Feb. 1	Plffs' reply brief in support of amended motion for order increasing bond, filed.
574	Feb. 20	MEMORANDUM & ORDER THAT PLFFS' MOTION TO INCREASE THE AMOUNT OF A SUPERSEDEAS BOND IS DENIED, FILED. 2-20-85 Entered & copies mailed.
1986		
575	JUL 02	Certified copy of Judgment (USCA) that the order of said District Court ente ed 1/18/83

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		which granted in party the deft's Motion for a judgment n.o.v. is granted. It is further ordered that judgment of said District Court entered 1/18/83 is vacated & the cause remanded to said District Court which is directed to reinstate the judgment entered 12/4/81 which is affirmed. Costs taxed in favor of appellants & crossappellees, briefs & appendix $3,120.00, filed.
576	JUL 03	PLFF'S MOTION FOR AWARD OF INTEREST, MEMO, CERT OF SERVICE, FILED.
577	JUL 07	ORDER THAT CONF. SCHEDULED FOR 8/6/86, 9:30AM, J. SHAPIRO'S CHAMBERS, FILED. 7/8/86 entered & copies mailed.
578	AUG 07	ORDER THAT PLFFS SHALL SUBMIT ANY FACTUAL MATERIALS AND/OR BRIEF ON ISSUE OF INTEREST BY 10/15/86. DEFTS RESPONSE WITHIN 30 DAYS & PLFFS REPLY BRIEF WITHIN 10 DAYS THEREAFTER, WHETHER A HEARING WILL BE HELD IS RESERVED, FILED. 8/7/86 entered & copies mailed.
579	AUG 07	ORDER THAT THE PARTIES SHALL REPORT ON STATUS OF FEE SETTLEMENT NEGOTIATIONS BY 9/30/86, IF FEE ISSUE HAS NOT BEE SETTLED, BRIEFS DUE, PLFFS 10/31/86, DEFTS 11/28/86, EVIDENTIARY HEARING & ORAL ARGUMENT 12/23/86, 9:30AM, CTRM 10-A, FILED. 8/7/86 entered & copies mailed.
580	SEP 16	Transcript of 8/6/86, filed.

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1986		
581	OCT 10	ORDER THAT COUNSEL SHALL ATTEND A SETTLEMENT CONFERENCE ON 11/12/86, ETC., FILED. 10/10/86 entered & copies mailed
582	OCT 10	STIPULATION AND ORDER THAT PLFFS MAY HAVE AN EXTENSION OF ONE WEEK TO 10/22/86 TO SUBMIT THEIR PAPERS ON ALL ISSUES OF POSTJUDGMENT INTEREST AND THAT DEFTS' BRIEF SHALL BE DUE 30 DAYS THEREAFTER, FILED. 10/14/86 entered and copies mailed.
583	OCT 20	Letter to Clerk from Richard P. McElroy, Esq. dtd 10/17/86 re: Morris L. Weisberg, Esq. has been withdrawn as counsl & Richard P. McElroy, Esq. appointed counsel, for deft., filed.
584	OCT 29	Plffs' Brief in Support of their Claim for Interest on Judgment under 28 USC §1961, cert of service, filed.
585	NOV 12	Defts' Objections to Plffs' Post Judgment Interrogatories & Request for Production of Documents, cert of service, filed.
586	NOV 19	STIPULATION & ORDER EXTENDING TIME UNTIL 12/17/86 IN WHICH DEFT. KAISER ALUMINUM & CHEMICAL CORP. HAS TO FILE ITS BRIEF ON THE ISSUE OF POST JUDGMENT INTEREST, FILED. 11/20/86 entered & copies mailed.
587	NOV 21	ORDER THAT A HEARING ON THE ISSUE OF POST JUDGMENT INTEREST WILL BE HELD ON 12/23/86, ETC. A HEARING ON THE ISSUE OF COUNSEL FEES WILL BE HELD BEGINNING

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1986		
		2/9/ ETC. FILED.
		11/21/86 Entered and Copies mailed.
588	NOV 26	Plff's Brief in Support of Application for Atty's Fee, cert of service, filed.
589	DEC 03	Defts Brief in Opposition to Plffs' Claim for interest on the judgment under 28 USC §1961, cert of service, filed.
590	DEC 08	Defts Robert A. Kennedy & Kennedy Culvert & Supply Co.'s Dissolution of Attachment, filed.
591	DEC 08	Defts Robert A. Kennedy & Kennedy Culvert & Supply Co.'s Praecipe to Mark Judgment Satisfied of the judgment of 12/26/79 for costs in favor of defts & against plff Columbia Metal Culvert Co., Inc., filed.
592	DEC 18	Plff's Reply Brief in Support of their Claim for Interest, cert of service, filed.
593	DEC 24	ORDER THAT EVIDENTIARY HEARING ON AWARD OF POST JUDGMENT INTEREST SCHEDULED FOR 1/7/87, 4:00PM, FILED.
		12/26/86 entered & copies mailed.
1987		
594	JAN 06	Defts' Submission in Opposition to Application of the United States Rule, cert of service, filed.
595	JAN 9	Hearing 1/7/87 re: award interest, witness sworn, filed.
596	JAN 09	STIPULATION & ORDER EXTENDING TIME UNTIL 1/20/87 IN WHICH DEFT HAS TO FILE BRIEF IN OPPOSITION TO PLFFS APPLICATION FOR ATTYS FEES, FILED.
		1/12/87 entered & copies mailed.

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1987		
597	JAN 12	Transcript of 12/23/86, filed. (ER)
598	JAN 20	PLFFS MOTION TO DEFER RULING ON PLFFS RIGHT TO ALLOCATE FUNDS RECD BETWEEN PRINCIPAL & INCOME, CERT OF SERVICE, FILED.
599	JAN 23	Transcript of 1/7/87, filed.
600	JAN 28	Defts' Preliminary Brief in Opposition to Plffs Application for Atty's Fee, cert of service, filed.
601	FEB 05	ORDER THAT BRIEFS SHALL BE FILED AS FOLLOWS: PLFFS' 11/26/86; DEFTS' PRELIMINARY, 1/28/87; DEFTS' FINAL, 2/16/87; PLFFS' REPLY, 3/2/87, ETC., FILED.
		2/6/87: Entered and copies mailed.
602	FEB 17	Defts' brief in opposition to Plffs' application for attorneys fees, certificate, filed.
603	FEB 17	Appendix to Defts' memo in opposition to plffs' application for the award of Attorneys' fees, filed.
604	MAR 9	PLFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, CERTIFICATION OF COUNSEL, CERTIFICATE OF SERVICE, BRIEF, FILED.
605	MAR 9	Reply brief of plff & Duane, Morris & Heckscher in support of application for attorney's fee, certificate of service, affidavits, filed.
606	MAR 23	Deft's brief in opposition to motion to compel, cert. of service, filed.
607	MAY 04	STIPULATION & ORDER THAT FOR THE PURPOSES OF RELEASING THE SUPERCEDEAS BOND CURRENTLY MAINTAINED BY DEFTS KAISER ALUMINUM & CHEMICAL CORP. & KAISER ALUMINUM & CHEMICAL SALES, INC.

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		ALL PARTIES AGREE THAT A BOND IS NO LONGER REQUIRED AS PRINCIPAL JUDGMENT HAS BEEN PAID. THIS STIPULATION IS ENTERED INTO WITHOUT PREJUDICE TO PLFFS' CLAIM FOR INTEREST & ATTYS FEES, FILED.
		5/5/87 entered & copies mailed.
608	AUG 13	Plffs' Supplemental Brief in Support of Attys' Fees & Costs, cert of service, filed.
609	AUG 13	Affidavit of Regan R. Rockhill, cert of service, filed.
610	OCT 01	Defts' Supplemental Brief re: Impropriety of a Contingency Enhancement to Award of Atts Fees, cert of service, filed.
1988		
611	FEB 29	ORDER THAT A CONFERENCE IS SCHEDULED FOR 4/11/88, 4:30PM, FILED.
		3/1/88 entered & copies mailed.
612	APR 11	ORDER THAT PLFFS MOTION TO COMPEL ANSWERS TO INTERR. 3 & 6, FIRST SET & DEFTS ANSWER IN OPPOSITION, MOTION – DENIED, ETC., FILED.
		4/12/88 entered & copies mailed.
613	APR 12	MEMORANDUM & ORDER THAT PLFFS MOTION TO AWARD POST-JUDGMENT INTEREST – GRANTED, DEFTS SHALL PAY PLFFS POST-JUDGMENT INTEREST IN AMOUNT OF $2,632,886.30 CALCULATED AS FOLLOWS: INTEREST PERIOD (12/2/81 TO 7/3/86) = 4 yrs, 214 DAYS

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1988		
		INTEREST OWED = ($9,567,939) x (6%) x (4 + (214/365)) = $2,632,886.30, FILED.
		4/12/88 entered & copies mailed.
614	APR 13	Plff's Notice of Appeal, filed. (USCA 88-1318)
		4/14/88 copies to F. Poul, R. McElroy, J. Shapiro, D. Spitz, Clerk, USCA.
615	APR 13	Copy of Clerk's Notice, filed.
616	APR 20	ORDER THAT A HEARING IS SCHEDULED FOR 6/1, 6/2 & 6/3/88, 10:AM, CTRM 10-A, FILED.
		4/21/88 entered & copies mailed.
617	APR 29	Appellant's TPO form, filed.
--	MAY 3	RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT ALREADY ON FILE.
618	MAY 11	Kaiser Aluminum & Chemical Corp. & Kaiser Aluminum & Chemical Sales, Inc's cross notice of appeal, filed. (USCA 88-1396)
		5-12-88 Entered & copies to: USCA, D. Spitz, Judge Shapiro, M. Baylson, F. Poul.
619	MAY 11	Copy of Clerk's Notice, filed.
620	MAY 16	ORDER THAT ORAL ARGUMENT SCHEDULED FOR 6/1/88 IS CANCELLED, FILED.
		5/16/88 entered & copies mailed.
621	MAY 16	MOTION OF DEFTS TO STAY EXECUTION ON 4/11/88 ORDER FIXING THE AMOUNT OF POST JUSGMENT INTEREST, MEMO, CERT OF SERVICE, FILED.
622	MAY 18	Memorandum of Plffs in Opposition to Defts Motion for Stay of Execution of Interest Award, cert of service, filed.

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1988		
623	MAY 19	Reply Memorandum of defts in support of Motion to Stay Execution on 4/11/88 Order Fixing amount of post judgment interest, cert of service, filed.
(621)	MAY 20	ORDER THAT DEFTS MOTION – GRANTED, EXECUTION IS STAYED WITHOUT BOND, FILED. 5/20/88 entered & copies mailed.
624	MAY 24	Appellant's TPO form, filed.
625	JUN 24	ORDER THAT THE HEARING ON THIS CASE SCHEDULED FOR 7/5/88, 7/6/88 AND 7/7/88 IS CANCELLED, FILED. 6/27/88 entered & copies mailed.
626	OCT 13	Letter recd from Elizabeth A. Welch for receipt of plff's exhibits, filed.
627	OCT 13	Order that in accordance with LR 39 of this court, the following exhibits have been deemed abandoned & destroyed, deft's exhibits, filed.
1989		
628	MAR 21	ORDER THAT ON DISPOSITION OF THE PETITION FOR REHEARING PLFFS MAY SUPPLEMENT THE FEE PETITION WITH ANY CLAIM FOR ATTORNEY'S FEES ON APPEAL WITHIN 60 DAYS: ETC: DEFTS MAY RESPOND WITH REGARD TO ITEMS CONTESTED AS TO NATURE OR AMOUNT (TIME EXPENDED OR RATE CHARGED): AN EVIDENTIARY HEARING WILL BE HELD BEGINNING ON JUNE 19, 1989 at 9:00AM, FILED. 3/21/89 entered & copies mailed.
629	MAY 18	PLFFS' MOTION FOR SUBSTITUTION

Date		Proceedings
1989		
		OF PARTY BY REASON OF DEATH, MEMO, CERTIFICATE, FILED.
630	MAY 19	Affidavit of Edward G. Biester, III regarding supplemental request for fees and costs through April 30, 1989, filed.
631	MAY 19	Affidavit of William G. Frey regarding supplemental request for fees and costs through April 30, 1989, filed.
(629)	JUN 07	ORDER THAT LORRAINE KERR'S MOTION IS GRANTED, & THAT THIS ACTION SHALL PROCEED WITH LORRAINE KERR, EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR, SUBSTITUTED AS A PARTY PLFF IN THE PLACE OF GEORGE M. KERR, JR, FILED. 6/7/89 entered & copies mailed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-1047

Date	*Proceedings*
1983	
Jan. 21	Motion by applts. to expedite appeal, in which it states applts. can file B&A within 20 days from 1/21/83 (2-10-83), and propose that appees. brief be filed at 20 day intervals & oral argmt. be scheduled as promptly as possible, w/svc., filed.
Jan. 21	Motion by applts. to file a separate appdx., w/svc., filed.
Jan. 27	Memorandum by appee. Kaiser Aluminum in response to mot. to expedite appeal, w/svc., filed.
Jan. 27	Reply by appees. Kaiser Aluminum, to applts' mot. to file a sep. appdx., w/svc., filed.
Jan. 28	Submitted on applts' mot. to expedite appeal, and mot. to file sep. appdx. Coram: Gibbons, Hunter & Rosenn, C.J.
Feb. 2	Letter dated 2/1/83 from C. Charles Hodgson, Jr., Esq., adv. his client Robert Kennedy & Kennedy Culvert will be involved in this appeal and accordingly no appearance will be entered. Send to Merits Panel.
Feb. 8	Order (*Gibbons,* Hunter & Rosenn, C.J.) denying applts' mot. to expedite appeal; denying applts' mot. to file a sep. appdx., and stating Judge Hunter would grant the mot. to expedite the appeal, filed.
Mar. 21	Motion by appees-cross-applts., Kaiser Aluminum etc., et al. to file a B. in excess of 50 pgs. to 75 pgs., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 22	Response by applts. to mot. of appees-cross-applts., Kaiser to file B. in excess pagn., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 28	Order (Clerk) denying above mot. as presented; granting permission to file a brief not to exceed 60 pgs., filed. (Cov. 83-1047 & 83-1079)

Date	*Proceedings*
1983	
Apr. 15	Motion consent, for leave to file one additional volume of appendix, (Vol. 13), w/serv., filed.
Apr. 26	Order (Clerk) grant above motion, filed.
May 24	Consent Motion by aplts for enlargement of the number of pages in their second brief, w/serv, filed.
May 31	Order (Acting Clerk) denying above mot. as presented; directing cnsl may file a brief in excess of pgs. of ten (10), filed.
May 26	Ltr dated 5/25/83 from Michael M. Baylson, cnsl for applt., stating that cnsl for both sides request this matter not be listed for disposition between Aug 8-19 and Aug. 29-Sept. 9, etc. Send to merits
June 1	Mot. by applts-cross-applees for leave for leave to file one addl. vol. of appendix (Vol. 14), w/consent, w/serv., filed. (cvs. 83-1047 & 1079)
June 3	Order (Clerk) granting above mot. with filing as of the date of this order, filed. (Cvs. 83-1047 & 1079)
June 16	Mot. by applts-cross-applees to advance case on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 16	Memorandum of applees-cross-applts in opposition to mot. to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 20	Order (Clerk) denying applts-cross-applees' mot. to advance cases on Court's calendar, filed. (Cvs. 83-1047 & 1079)
June 24	Ltr dated 6/24/83 from Michael M. Baylson, Esq., cnsl for applt. pursuant to Rule 28 (j), F.R.A.P., recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
June 24	Ltr dated 6/24/83 from cnsl for applt. requesting that cases be listed on Wednesday, 9/14/83 or Thursday, 9/15/83. (Cvs. 83-1047 & 1079)
June 29	Ltr dated 6/29/83 from Richard P. McElroy, Esq., cnsel for applees. pursuant to Rule 28(j), F.R.A.P.,

Date	*Proceedings*
1983	
	recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
Nov. 14	Ltr dtd 11/11/83 from Michael M. Baylson, Esq, cnsel for applts in 83-1047, recd for the Court's info. (Cvs. 83-1047 and 83-1079)
Nov. 17	Copy of 11th Cir's opinion in *Graphic Products Distributors, Inc. v. Itek Corp.*, recd from Michael M. Baylson, Esq., for the Court's info. (Cvs. 83-1047 & 1079)
Dec. 16	Clk's ltr to cnsel, written at the direction of the Crt, directing cnsel to reply to the question of what effect, if any, a holding that a corp. cannot conspire with its wholly-owned subsidiary would have on the issues in the case of *Copperweld Corp. v. Independence Tube Co.*, No. 82-1210, orig & 3cc's shld be recd by the Clk on or before 12/22/83. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Court. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., appendix to ltr, recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 28	Clerk's letter to counsel, written at the direction of the Ct., advising the Court has decided to await the S.C. opinion in *Copperweld Corp. v. Independence Tube Co.* (Cvs. 83-1047 & 83-1079)
1984	
June 21	Ltr. dtd 6/21/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., w/encl., recd for the Crt's info. (Cvs. 83-1047 & 1079)
June 21	Ltr dtd 6/21/84 from Michael M. Baylson, Esq,

Date	*Proceedings*
1984	
	requesting the opportunity to submit a ltr to the Crt giving addl reasons why the *Copperweld* decision does not effect the present case *and* to submit reasons why *Copperweld* shld be held not retroactive to this case, *and* for permission to submit these ltrs by 6/29/84. (Cvs. 83-1047 and 84-1079)
June 25	Clk's ltr to cnsel, written at the direction of the Crt, requesting cnsel to comment by ltr on the effect of the S.C. decision in *Copperweld Corp. v. Independence Tube Corp.*, decided 6/19/84, 52 Law Week 4821, on the issues presented in the above matter; orig & 3cc's of ltrs shld be recd by Clk's ofc on or before 7/10/84. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Michael Baylson, Esq, cnsel for Bonjorno, et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 12	Ltr dtd 7/12/84 from Henry T. Reath, Esq, cnsel for Bonjorno, et al., correcting and supplementing a matter contained in his ltr of 7/10/84. (Cvs. 83-1047 & 1079)
Oct. 1	Ltr dtd 10/1/84 from Michael Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 6	Ltr dtd 11/6/84 from Richard P. McElroy, Esq, cnsel for applees, Kaiser Aluminum & Chemical Corp., et al., w/encls., recd for the Crt's info. (Cvs 83-1047 & 1079)
Nov. 8	Ltr dtd 11/7/84 from Michael M. Baylson, Esq, cnsel for Bonjorno, et al., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cv. 83-1047 & 1079) (dt)

Date	Proceedings
1985	
Jan. 3	Motion of Appellees, Cross-Appellants, Kaiser Aluminum & Chemical, et al, for a thirty day extension of time within which to file pet. for rehg, filed. w/serv. (ch) Covers 83-1047 and 83-1079
Jan. 10	Order (Seitz, C.J.) granting mot. of appee/crs. aplts, for a thirty day ext. of time in which to file pet. for rehg. to and including Feb. 11, 1985, filed. (ml) (Cvs. 83-1047 & 83-1079)
1984	
Dec. 27	The order of the D.C. entered 1-18-83 which granted in part defendant's motion for a judgment n.o.v. is reversed. The judgment of the D.C. is vacated and the cause remanded to D.C. which is directed to reinstate the judgment entered 12-4-81, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court, filed. (ml) (Cvs. 83-1047 & 83-1079)
1985	
Jan. 17	Motion of Appellees, Cross-appellants, Kaiser Aluminum, et al., for leave to increase the maximum number of pages in their pet. for rehg. to 30 pps. filed. (Cvs. 83-1047 & 83-1079) (ml)
Jan. 22	Order (Seitz, C.J.) granting apees, crs-aplts leave to increase max. number of pages in pet. for rehg. to thirty pages, filed. (ml) (Cvs. 83-1047 & 83-1079)
Feb. 14	Motion of appellant for leave to file bill of costs out of time, w/serv., filed. (ml) (Cvs. 83-1047 & 83-1079)
Feb. 26	Order (Clerk) granting appellant's motion for leave to file bill of costs out of time, filed. (ml) (Cvs. 83-1047 & 83-1079)
March 8	Order (Aldisert, Ch.J., *Seitz*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker & Rosenn, C.Js.) denying the petition for

Date	Proceedings
1985	
	rehearing in banc. Judge Becker would grant rehearing limited to the price-squeeze issue, together with separate statement sur denial of petition for rehearing by Judge Adams. (Cvs. 83-1047 & 83-1079) (ml)
March 13	Motion of apee/crs-aplt., Kaiser Aluminum, et al. for an order staying issuance of mandate, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
March 15	Response of appellants/cross-apees. Bonjorno, et al. to apees/crs.aplts. motion for an order staying issuance of mandate, filed. (Cvs. 83-1047 & 83-1079) (ml)
March 27	Order (Seitz, C.J.) staying issuance of mandate to and including June 6, 1985, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 1	Motion of appellants/cross-appellees, Bonjorno, et al., for posting of security by appellees/ cross-appellants, Kaiser Aluminum & Chemical Corporation, et al., w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
April 8	Response of appees/crs.aplts. Kaiser Aluminum, et al. in opposition to motion of aplts/crs.apees for posting security, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 12	Clerk's letter to counsel written at the direction of the Court requesting counsel to comment on the applicability of Rule 44.2 of the Rules of the S.C. of the U.S.A., to this matter. Responses due on or before 4-17-85. (Cvs. 83-1047 & 1079) (ml)
April 17	Letter dated 4-17-85, from Joseph A. Fillip, Jr., Esq., cnsl for Bonjorno, et al., in response to Court's request of 4-12-85, filed. (83-1043 & 1079)
April 17	Letter dated 4-17-85, from Alexander D. Bono, Esq., cnsl for Kaiser, et al. in response to Court's request of 4-12-85, filed. (Cvs. 83-1047 & 1079) (ml)
April 26	Order (SEITZ, CJ) which reads as follows: "The foregoing motion and the response having been considered along with the supplemental briefing and

Date	*Proceedings*
1985	
	being of the view that I may exercise discretion and that appellees-cross appellants have shown good cause under the present circumstances for not requiring additional security, it is Ordered that the motion is denied", filed. (1043 & 1079) (ch)
1986	
June 24	~~Motion by Plaintiffs-Appellants-Cross-Appellees' pursuant to FRAP 37 for inclusion in mandate of instructions regarding interest filed (Covers 83-1047 & 83-1079) (bjr)~~ WITHDRAWN 6/30/86
June 26	Ltr. date 6/26/86 rec'd from Michael M. Baylson, Esquire.
June 30	Stipulation by the cnsl for the parties as follows: 1. The mandate shall issue to the U.S. D.C. for the Eastern Dist of Penna. immediately and shall state that the D.C. should consider all issues regarding the calculation of interest in this case. 2. Plaintiffs – Aplts – Cross-Appees withdraw, without prejudice, their Motion Pursuant to Fed. R. App. P. 37 for inclusion in Mandate of Insructions regarding Interest. 3. Defendants = Appees-Cross-Aplts. agree that they will not contend that plaintiffs have waived any procedural or substantive claim for interest by this Court not considering the issue of interest Covers. 83-1047 and 83-1079, filed. (bjr)
July 1	Order (*Seitz,* Gibbons and Rosenn, CJs) approving the above stipulation. The mandate shall issue promptly, filed. (Covs. 83-1047 & 83-1079) (bjr)
1988	
April 25	Motion of Applt's cross Aplees to recall & amend the mandate to award postjudgment interest pursuant to F.R.A.P. 37, w/serv.fld., (bj)(cvs.83-1047 & 83-1079) (bj)
April 27	Ltr dtd Apr 27, 1988, frm R.P.McElroy, Esq., rec'd,

Date	*Proceedings*
1988	
	(bj) (cvs. 83-1047/1079)
May 3	Opposition of Defendants-applts-cross-aplees to motion to recall & amend the mandate to award post judgment interest pursuant to FRAP 37, fld., (bj) (cvs. 83-1047/79)
May 5	Applts reply Memo in suupport of Motion to Recall & Amend Mandate, w/service, rec'd for the info of the Court, (bj) (cvs. 83-1047/79) (bj)
May 20	Order (Gibbons, Ch.J., *Seitz* & Rosenn, C.J.'s) denying motion to Plaintiffs-Appellant-Cross-Appellees to Recall & amend Mandate to Award Posjudgment Intrerest, without prejeduce to any direct appeal., fld. (bj) (cvs. 83-1047 & 83-1079) (bj)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET NO. 83-1079

Date	*Proceedings*
1983	
Mar. 21	Motion by appees-cross-applts., Kaiser Aluminum etc., et al. to file a B. in excess of 50 pgs. to 75 pgs., w/svc., filed. (Cov. 83-1047 & 83-1079)
Mar. 28	Order (Clerk) denying above mot. as presented; granting permission to file a brief not to exceed 60 pgs., filed. (Cov. 83-1047 & 83-1079)
Mar. 22	Response by applts. to mot. of appees-cross-applts., Kaiser to file B. in excess pagr ., w/svc., filed. (Cov. 83-1047 & 83-1079)
June 16	Mot. by applts-cross-applees to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 16	Memorandum of applees-cross-applts in opposition to mot. to advance cases on Court's calendar, w/serv., filed. (Cvs. 83-1047 & 1079)
June 20	Order (Clerk) denying applts-cross-applees' mot. to advance cases on Court's calendar, filed. (Cvs. 83-1047 & 1079)
June 1	Mot. by applts-cross-applees for leave to file one addl. vol. of appendix (Vol. 14), w/consent, w/serv., filed. (Cvs. 83-1047 & 1079)
June 3	Order (Clerk) granting above mot. with filing as of the date of this order, filed. (Cvs. 83-1047 & 1079)
June 24	Ltr dated 6/24/83 from Michael M. Baylson, Esq., cnsl for applt. pursuant to Rule 28(j), F.R.A.P., recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
June 24	Ltr dated 6/24/83 from cnsl for applt. requesting that cases be listed on Wednesday, 9/14/83 or Thursday, 9/15/83. (Cvs. 83-1047 & 1079) Send to Merits
June 29	Ltr dated 6/29/83 from Richard P. McElroy, Esq., cnsel for applees. pursuant to Rule 28(j), F.R.A.P.,

Date	*Proceedings*
1983	
	recd. for the Court's info. (Cvs. 83-1047 & 1079) Send to Merits
Nov. 14	Ltr dtd 11/11/83 from Michael M. Baylson, Esq, cnsel for applts in 83-1047, recd for the Court's info. (Cvs. 83-1047 & 1079)
Nov. 17	Copy of 11th Cir's opinion in Graphic Products Distributors, Inc. v. Itek Corp recd from Michael M. Baylson, Esq., for the Court's info. (Cvs. 83-1047 & 83-1079)
Dec. 16	Clk's ltr to cnsel, written at the direction of the Crt, directing cnsel to reply to the question of what effect, if any, a holding that a corp. cannot conspire with its wholly-owned subsidiary whould have on the issues in the case of *Copperweld Corp. v. Independence Tube Co.*, No. 82-1210, orig & 3cc's, shld be recd by the Clk on or before 12/22/83. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 22	Ltr dtd 12/22/83 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., appendix to ltr, recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
Dec. 28	Clerk's letter to counsel, written at the direction of the Court, adv. the Ct. has decided to await the S.C. opinion in *Copperweld Corp. v. Independence Tube Co.* (Cvs. 83-1047 & 83-1079)
1984	
June 21	Ltr dtd 6/21/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., w/encl., recd for the Crt's info. (Cvs. 84-1047 & 79)
June 21	Ltr dtd 6/21/84 from Michael M. Baylson, Esq, requesting the opportunity to submit a ltr to the Crt giving addl reasons why the *Copperweld* decision

Date	Proceedings
1984	
	does not effect the present case *and* to submit reasons why *Copperweld* shld be held not retroactive to this case, *and* for permission to submit these ltrs by 6/29/84. (Cvs. 83-1047 and 83-1079)
June 25	Clk's ltr to cnsel, written at the direction of the Crt, requesting cnsel to comment by ltr on the effect of the S.C. decision in *Copperweld Corp. v. Independence Tube Corp.*, decided 6/19/84, 52 Law Week 4821, on the issues presented in the above matter; orig & 3cc's of ltrs shld be recd by Clk's ofc on or before 7/10/84. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Richard P. McElroy, Esq, cnsel for Kaiser Aluminum & Chemical Corp., et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 10	Ltr dtd 7/10/84 from Michael M. Baylson, Esq, cnsel for Bnonjorno, et al., recd at the direction of the Crt. (Cvs. 83-1047 & 1079)
July 12	Ltr dtd 7/12/84 from Henry T. Reath, Esq, cnsel for Bnonjorno, et al., correcting and supplementing a matter contained in his ltr of 7/10/84. (Cvs. 83-1047 & 1079)
Oct. 1	Ltr dtd 10/1/84 from Michael M. Baylson, Esq, cnsel for Joseph A. Bonjorno, et al., w/encl., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 6	Ltr dtd 11/6/84 from Richard P. McElroy, Esq, cnsel for applees, Kaiser Aluminum & Chemical Corp., et al., w/encls., recd for the Crt's info. (Cvs. 83-1047 & 1079)
Nov. 8	Ltr dtd 11/7/84 from Michael M. Baylson, Esq, cnsel for Bonjorno, et al., pur. to Rule 28(j), F.R.A.P., recd for the Crt's info. (Cv. 83-1047 & 1079) (dt)
1985	
Jan. 3.	Motion of Appellees, Cross-Appelants, Kaiser Aluminum & Chemical Corp., et al, for a thirty day

Date	Proceedings
1985	
	extension of time within which to file pet. for rehg, filed. w/serv. Cvs. 83-1047 & 83-1079 (ch)
Jan. 10	Order (Seitz, C.J.) granting mot. of appe/crs. aplts, for a thirty day ext. of time in which to file pet. for rehg. to and including Feb. 11, 1985, filed. (ml) (Cvs. 83-1047 & 83-1079)
Dec. 27	JUDGMENT – The order of the D.C. entered 1-18-83 which granted in part defendants motion for ajudgment n.o.v. is reversed. The judgment of the D.C is vacated and the cause remanded to D.C. which is directed to reinstate the judgment entered 12-4-81, which is affirmed. Costs taxed in favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court, filed. (ml) (Cvs. 83-1047 & 83-1079)
Jan. 17	Motion of appelleesm cross-appellants, Kaiser Aluminum, et al., for leave to increase the maximum number of pages in their pet. for rehg., to 30 pages filed. (Cvs. 83-1047 & 83-1079) (ml)
Jan. 22	Order (Seitz, C.J.) granting apees, crs-aplts leave to increase the maximum number of pages in pet. for rehg. to thirty pages, filed. (Cvs. 83-1047 & 83-1079) (ml)
Feb. 14	Motion of appellants/cross-appellees for elave to file bill of costs out of time, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
Feb. 26	Order (Clerk) granting appellants/crs-apees mot. for leave to file bill of costs out of time, (Cvs. 83-1047 & 83-1079) (ml)
March 8	Order (Aldisert, Ch.J., *Seitz*, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker & Rosenn, C.Js.) denying the petition for rehearing in banc. Judge Becker would grant rehearing limited to the price-squeeze issue; together with

Date	Proceedings
1985	
	separate statement sur denial of petition for rehearing by Judge Adams. (Cvs. 83-1047 & 83-1079) (ml)
March 13	Motion of apee/crs-aplt., Kaiser Aluminum, et al. for an order staying issuance of mandate, w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
March 15	Response of aplts./crs.-apees. Bonjorno, et al. to apees/crs.aplts. motion for an order staying issuance of mandate, filed. (Cvs. 83-1047 & 1079) (ml)
March 27	Order (Seitz, C.J.) staying issuance of the mandate to and including June 6, 1985, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 1	Motion of appellants/cross-appellees, Bonjorno, et al., for posting of security by appellees/cross-appellants, Kaiser Aluminum & Chemical Corporation, et al., w/serv., filed. (Cvs. 83-1047 & 83-1079) (ml)
April 8	Response of appees/crs.aplts. Kaiser Aluminum, et al. in opposition to motion of aplts/crs.apees for posting security, filed. (Cvs. 83-1047 & 83-1079) (ml)
April 12	Clerk's letter to counsel, written at the direction of the Court requesting counsel to comment on the applicability of Rule 44.2 of the Rules of the S.C. of the U.S.A., to this matter. Responses due on or before 4-17-85. (Cvs. 83-1047 & 83-1079) (ml)
Apr. 17	Letter dated 4-17-85, from Joseph A. Fillip, Jr., Esq., cnsl for Bonjorno, et al., in response to Court's request of 4-12-85, filed. (Cvs. 83-1043, 83-1079) (ml)
Apr. 17	Letter dated 4-17-85, from Alexander D. Bono, Esq., cnsl for Kaiser, et al. in response to Court's request of 4-12-85, filed. (Cvs. 83-1047 & 1079) (ml)
Apr. 26	Order (SEITZ, CJ) which reads as follows: "the foregoing motion and the response having been considered along with the supplemental briefing and being of the view that I may exercise discretion and

Date	Proceedings
1985	
	that appellees/cross-appellants have shown good cause under the present circumstances for not requiring additional security, it is Ordered that the motion is denied", filed. (1047 & 1079) (ch)
1986	
Jun 24	~~Motion by Plaintiffs-Appellants-Cross-Appellees' pursuant to FRAP 37 for inclusion in mandate of instructions regarding interest filed. (Covers 83-1047 & 83-1079) (bjr)~~ WITHDRAWN 6/30/86.
Jun 26	Ltr. dated 6/26/86 rec'd from Michael M. Baylson, Esquire.
Jun 30	Stipulation by cnsl for the parties as follows: 1. The mandate shall issue to the U.S.D.C. for the Eastern Dist of Penna. immediately and shall state that the D.C. should consider all issues immediately and shall state that the D.C. should consider all issues regarding the calculation of interest in this case. 2. Plaintiffs-Aplts -Cross-Appees withdraw, without prejudice, their Motion Pursuant to Fed. R. App. P. 37 for inclusion in Mandate of Instructions regarding Interest. 3. Defendants-Appees-Cross-Aplts. agree that they will not contend that plaintiffs have waived any procedural or substantive claim for interest by this Court not considering the issue of interest Covers 83-1047 and 83-1079, filed. (bjr)
Jul 1	Order *(Seitz,* Gibbons and Rosenn, CJs) approving the above stipulation. The mandate shall issue promptly, filed. (Covs. 83-1047 & 83-1079) (bjr)
1988	
Apr 25	Motion of Applt's cross Aplees to recall & amend the mandate to award post interest pursuant to F.R.A.P. 37, w/serv.fld.,(bj)(cvs.83-1047 & 83-1079)
Apr 27	Ltr dtd Apr 27, 1988, frm R.P.McElroy,Esq., rec'd,

Date	*Proceedings*
1988	
	(bj)(cvs.83-1047/1079)
May 3	Opposition of def-applt-cross-apee to motion to recall & amend mandate to award postjudgment interest pursuant to FRAP 37,w/serv.fld(bj) (cvs. 83-1047/79)
May 5	Aplt rply Memo in support of Motion to Recall & amend Mandate, w/serv.,rec'd for the info of the Court, (bj)(cvs.87-1047/79)(bj)
May 20	Order(Gibbons,Ch.J.,*Seitz* & Rosenn,C.J.'s) denying motion of Plaintiffs-Appellant-Cross-Appellees to Recall & amend Mandate to Award Posjudgment Intrerest, without prejeduce to any direct appeal.,fld.(bj)(cvs.83-1047 & 83-1079)(bj)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET No. 88-1318

Date	*Proceedings*
1988	
June 6	Mot. by aplt. for leave to exceed page limit, filed. (gt) (Cvs. 88-1318/96)
June 7	Order (Clerk) denying above mot., filed. (gt) (Cvs. 88-1318/96)
June 9	Aplt's. mot. for reconsideration of Clerk's 6-7-88 order denying leave to exceed page limit in B, filed. (gt) (Cvs. 88-1318/96)
June 13	Let. from aplt. ddt. 6-12-88, requesting to file B of 70 pages, filed. (gt) (Cvs. 88-1318/96)
June 21	Order (Gibbons) denying mot. for reconsideration of Clerk's 6-7-88 order to exceed pg. limit, filed. (gt) (Cvs. 88-1318/96)
Oct. 11	Motion by aplts-cross-apees for enlargement of time for oral argument for an add'l. 20 min. per side, filed. (adl) (Cvs 1318, 1396)
Oct. 14	Order (Stapleton, Scirica and Cowen) denying above mot., filed. (gt) (Cvs. 88-1318/96)
Oct. 14	Petition of aplts. for leave to furnish argument panel with index to various briefs, filed. (gt) (Cvs. 88-1318/96)
Oct. 12	Aplees'-cross aplts'. memorandum in opposition to mot. for enlargement of time for oral argument and correction of errata in B of aplees'-cross aplts, filed. (gt) (Cvs. 88-1318/96)
Oct. 17	Let. from aplts-cross aplees. ddt. 10-17-88, sent pursuant to 28(j)F.R.A.P., filed. (gt)(88-1318/96)
Oct. 18	Mot. of aplees-cross aplts. to strike all post-briefing submissions of aplts-cross aplees, filed. (gt) (Cvs. 88-1318/96)
Oct. 21	Petition of aplts-cross aplees. to add discrete portions of cnsl's prepared argument not covered at oral

Date	*Proceedings*
1988	
	argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 24	Let. from aplee-cross aplts., ddt. 10-24-88, sent for the information of the Ct., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 24	Memorandum of aplees-cross aplts. in opposition to pet to add discrete portions of cnsl's prepared argument not covered at oral argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 25	Aplts' memorandun in response to Kaiser's post-briefing submissions, filed. (gt) (Cvs. 88-1318/96)
Oct. 26	Let. from aplts. ddt. 10-26-88, in response to aplees. 10-24-88 let., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 26	Response of Kaiser Aluminum to aplts' submission entitled "Equitable Power of Courts to Award Market Rate Interest Above Minimum Rate Designated in Federal Interest Statute, rec'd. (gt)
Oct. 31	Order (Stapleton, Scirica and *Cowen*) denying aplts-cross aplees' 10-21-88 mot. to add discrete portions of cnsl's prepared argument not covered at oral argument, filed. (gt) (Cvs. 88-1318/96)
1989	
Jan 23	Petition For Rehearing In Banc from Kaiser Alum. w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 20	Pet. For Inclusion Of Instructions in The Mandate Regarding Calculation of Interest from Bonjorno, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 27	Response of Kaiser Aluminum & ChemCorp & Kaiser Alum & Chem.Sale,Inc to Petition For Inclusion Of Instructions In The Mandate Regarding Calculation of Interest, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396) (gt)
Feb. 7	Order (Stapleton, Scirica and *Cowen*) granting 10-18-88 mot. to strike, filed.
Feb. 7	Order (Stapleton, Scirica and *Cowen*) denying aplts'

Date	*Proceedings*
1989	
	petition for leave to furnish argument panel with index to the various briefs filed by plaintiff filed. (gt) (Cvs. 88-1318/96) (Cvs. 88-1318/96)
Feb 13	Order (Gibbons, Ch.J. Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, *Cowen* & Nygaard, C.J.'s) The petitions for rehearing by aplts in 88-1318 & 88-1396 are denied. Judge Stapleton wld have granted in banc for the reasons set forth in his dissent. Judge Becker & Judge Hutchinson wld also have granted rehearing in banc., fld. (bj) (cvs. 88-1318 & 88-1396) (bj)
Feb 13	Order (Stapleton, Scirica & *Cowen*, C.J.) Denying Bonjorno's Pet. For Inclusion of Instructions in Mandate re Calculation of Interest, fld. (bj) (cvs. 88-1318/1396)
Feb 21	Motion by Kaiser, for stay of the Mandate, (90 days) to & including May 14, 1989, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 21	Amended Order (Stapleton, Scirica & *Cowen*, C.J.) The Court's Order filed 2-13-89 is hereby amended & supplemented as follows: The court being of the view that the issue raised should be determined by the D.C. in the first instance, the Petition For inclusion of Instructions in the Mandate is denied, fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 27	Order (Stapleton, Scirica & *Cowen*, C.J.) granting Kaiser's stay of the Mandate to & including March 30, 1989, no further stay to be granted, fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 28	Motion of Appellants-cross appellees For Reconsideration of Order Granting Stay of Issuance of Mandate, w/serv. fld. (bj) (cvs. 88-1318 & 1396)
Feb 28	Motion of appellant-coss appellees, Bonjorno, to Require A bond, w/serv. fld. (bj)

Date	*Proceedings*
1989	
Feb 28	Memorandum of Law of Applts-cross-appellees, Bonjorno, in support of Motion to Require A Bond And In Opposition to Kaiser's Motion to Stay Issuance of Mandate, w/serv. fld., (bj) (cvs. 88-1318 & 88-1396
Mar 2	Ltr dtd 3-2-89 frm A.B. Laupheimer, rec'd. (bj) (cvs. 88-1318 & 88-1396)
Mar 7	Response of (Kaiser) appellees/defendants/cross-appellant to Motion For Reconsideration of Order Granting Stay of Issuance of the Mandate and Motion to Require a Bond, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 8	Reply Memorandum Of Appellants-PLaintiffs-Cross-Appellees (Bonjorno) in Support of Motion to Require A Bond & In Opposition To Kaiser's Motion For Stay of Issuance of the Mandate, rec'd for the information of the Court, (bj) (cvs. 88-1318 & 88-1396)
Mar 20	Order (Stapleton, Scirica & *Cowen*, C.J.) The foregoing Motion by applt-cross0appellees, Bonjorno, et al for reconsideration of Order granting Stay of Issuance of Mandate is Denied. In addition, the motion of Bonjorno, et al., to require a Bond, is Denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 28	Motion For Substitution Of Party by Reason of Death, by Bonjorno et al., w/serv. fld. (bj) (cvs. 88-1318/ & 88-1396)
Mar 29	Order (Clerk) Upon consideration of the Motion of Lorraine Kerr to sub. her as a party as Executrix of Will of G. M. Kerr, Jr., it is hereby Ordered that said Motion is Granted, and Lorraine Kerr is substituted as a party to this action as Exec. of Will of G. M. Kerr, Jr., if there are any future proceedings in this Court, fld. (bj) (cvs. 88-1318 & 1396)
Mar 31	Ltr dtd 3-30-89 frm Laupheimer, Esq., cert. filed at

Date	*Proceedings*
1989	
	US Sup.Ct on 3-30-89, w/serv. rec'd (bj) (cvs. 88-1318/1396)
Apr 5	CC copy of certificate of evidencing docketing on March 13, 1988 at Supreme Court No. 88-1595, frm Clerk of Supreme Ct., fld. (bj) (cvs. 88-1318/96)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
DOCKET No. 88-1396

Date	*Proceedings*
1988	
June 6	Mot. by aplt. for leave to exceed page limit, filed. (gt) (Cvs. 88-1318/96)
June 7	Order (Clerk) denying above mot., filed. (gt) (Cvs. 88-1318/96)
June 9	Aplt's. mot for reconsideration of Clerk's 6-7-88 order denying leave to exceed page limit in B, filed. (gt) (Cvs. 88-1318/96)
June 13	Let. from aplt. ddt. 6-12-88, requesting to file B of 70 pages, filed. (gt) (Cvs. 88-1318/96)
June 21	Order (Gibbons, Ch.J.) denying mot. for reconsideration of Clerk's 6-7-88 order to exceed pg. limit, filed. (gt) (Cvs. 88-1318/96)
Oct. 11	Motion by aplts-cross-apees for enlargement of time for oral argument for an add'l. 20 min. per side, filed. (adl) (Cvs 1318, 1396)
Oct. 14	Order (Stapleton, Scirica and Cowen) denying above mot., filed. (gt) (Cvs. 88-1318, 1396)
Oct. 14	Petition of aplts. for leave to furnish argument panel with index to various briefs, filed. (gt) (Cvs. 88-1318, 1396)
Oct. 12	Aplees'-cross aplts. memorandum in opposition to mot. for enlargement of time for oral argument and correction of errata in B of aplees-cross aplts, filed. (gt) (Cvs. 88-1318/96)
Oct. 17	Let. from aplt. cross aplees. ddt. 10-17-88, sent pursuant to 28(j)F.R.A.P., filed. (gt)(Cvs. 88-1318/96)
Oct. 18	Mot. of aplees-cross aplts. to strike all post briefing submissions of aplts.-cross aplees. filed. (gt) (Cvs. 88-1318/96)

Date	*Proceedings*
1988	
Oct. 21	Petition of aplts-cross aplees. to add discrete portions of cnsl's. prepared argument not covered at oral argument due to time limitation, filed. (gt) (Cvs. 88-1318/96)
Oct. 24	Let. from aplee-cross aplts., ddt. 10-24-88, sent for the information of the Ct., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 24	Memorandum of aplees-cross aplts. in opposition to pet to add discrete portions of cnsl's. prepared argument not covered at oral argument due to time limitations, filed. (gt) (Cvs. 88-1318/96)
Oct. 25	Aplts' memorandum in response to Kaiser's post-briefing submissions, filed. (gt) (Cvs. 88-1318/96)
Oct. 26	Let. from aplts ddt. 10-26-88, in response to aplees'. 10-24-88 let., rec'd. (gt) (Cvs. 88-1318/96)
Oct. 26	Response of Kaiser Aluminum to aplts' submission entitled "Equitable Power of Courts to Award Market Rate Interest Above Minimum Rate Designated in Federal Interest Statute, rec'd. (gt) (Cvs. 88-1318/96)
Oct. 31	Order (Stapleton, Scirica and *Cowen*) denying aplts-cross aplees' 10-21-88 mot. to add discrete portions of cnsl'd prepared argument not covered at oral argument, filed. (gt) (Cvs. 88-1318/96)
1989	
Jan 23	Petition For Rehearing In Banc from KAiser Alum, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Jan 20	Petition For Inclusion Of Instructions in The Mandate Regarding Calculation of Interest, frm Bonjorno, w/serv. fld. (bj) (cvs. 88-1318-88-1396)
Jan 27	Response of Kaiser Aluminum & ChemCorp & Kaiser Alum & Chem.Sale,Inc to Petition For Inclusion Of Instructions In The Mandate Regarding Calculation of Interest, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)

Date	*Proceedings*
1989	
Feb. 7	Order (Stapleton, Scirica and *Cowen*) granting 10-18-88 mot. to strike, filed.
Feb. 7	Order (Stapleton, Scirica and *Cowen*) denying aplts' petition for leave to furnish argument panel with index to the various briefs filed by plaintiff, filed. (gt) (Cvs. 88-1318/96) (Cvs. 88-1318/96)
Feb 13	Order (Gibbons, Ch.J. Seitz, Higginbotham, Sloviter, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, *Cowen* & Nygaard, C.J.'s) The petitions for rehearing by aplts in 88-1318 & 88-1396 are denied. Judge Stapleton wld have granted in banc for the reasons set forth in his dissent. Judge Becker & Judge Hutchinson wld also have granted rehearing in banc., fld. (bj) (cvs. 88-1318 & 88-1396) (bj)
Feb 13	Order (Stapleton, Scirica & *Cowen,* C.J.) Denying Bonjorno's Pet. For Inclusion of Instructions in Mandate re Calculation of Interest, fld. (bj) (cvs. 88-1318/1396
Feb 21	Motion by Kaiser for stay of the Mandate, (90 days) to & including May 14, 1989, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 21	Amended Order (Stapleton, Scirica & *Cowen,* C.J.) The Court's Order filed 2-13-89 is hereby amended and supplemented as follows: The Court being of the view that the issue raised should be determined by the D.C. in the first instance, the Petition For inclusion of Instructions in the Mandate is denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Feb 27	Order (Stapleton, Scirica & *Cowen,* C.J.) granting Kaiser's Stay of the Mandate to & including March 30, 1989, *no further stay to be granted,* fld. (bj) (cvs. 88-1318 & 88-1396)

Date	*Proceedings*
1989	
Feb 28	Motion of Appellants-cross appellees For Reconsideration of Order Granting Stay of Issuance of Mandate, w/serv. fld. (bj) (cvs. 88-1318 & 1396)
Feb 28	Motion of appellant-coss appellees, Bonjorno, to Require A bond, w/serv. fld. (bj)
Feb 28	Memorandum of Law of Applts-cross-appellees, Bonjorno, in support of Motion to Require A Bond And In Opposition to Kaiser's Motion to Stay Issuance of Mandate, w/serv. fld., (bj) (cvs. 88-1318 & 88-1396)
Mar 2	Ltr dtd 3-2-89 frm A.B. Laupheimer, Esq., rec'd (bj) (cvs. 88-1318/1396)
Mar 7	Response of (Kaiser) appellees/defendants/cross-appellant to Motion For Reconsideration of Order Granting Stay of Issuance of the Mandate and Motion to Require a Bond, w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 8	Reply Memorandum Of Appellants-PLaintiffs-Cross-Appellees (Bonjorno) in Support of Motion to Require A Bond & In Opposition To Kaiser's Motion For Stay of Issuance of the Mandate, rec'd for the information of the Court, (bj) (cvs. 88-1318 & 88-1396)
Mar 20	Order (Stapleton, Scirica & *Cowen,* C.J.) The foregoing Motion by applt-cross0appellees, Bonjorno, et al for reconsideration of Order granting Stay of Issuance of Mandate is Denied. In addition, the motion of Bonjorno, et al., to require a Bond, is Denied., fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 28	Motion For Substitution of Party by Reason of Death, by Bonjorno, et al., w/serv. fld. (bj) (cvs. 88-1318 & 88-1396)
Mar 29	Order (clerk) Uponconsideraiton of the Motion of Lorrain Kerr to substitute her as a party as Executrix of Will of G. M. Kerr, Jr., it is hereby Ordered that

Date	*Proceedings*
1989	
	said motion is granted, and Lorraine Kerr is substituted as a party to this asction as Exec. of Will of G. M. Kerr, Jr., if there are any future proceedings in this Court., fld. (bj) (cvs. 88-1318 & 1396)
Mar 31	Ltr dtd 3-30-89 Laupheimer, Esq. stating cert. filed at US Sup.Ct on 3-30-89, w/serv. rec'd, (bj) (cvs. 88-1318/1396)
Arp 5	CC copy of certificate of evidencing docketing on 3-13-89 at S.C. #88-1595, frm Clk of Sup.Ct., fld. (bj) (cvs. 88-1318 & 1395)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes ✓ No __

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes ✓ No __

2. (a) Do you find from the evidence that the relevant product market was: (CHECK ONE ONLY)

   (i) aluminum culvert and drainage pipe? ✓

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? _____

   (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? _____

(b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

(a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminum culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained? or Yes ✓ No ___

(b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market? or Yes ✓ No ___

(c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes ✓ No ___

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monoply, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes ✓ No ___

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

_____

Foreperson

Date:_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount, or "None" in the following blank according to your finding. 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount, or "None" in the following blank according to your finding. 1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 31, 1977?

   State such amount, or "None" in the following blank according to your finding. 710,000

/s/
Foreperson

Dated: 8/21/79

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT COMPANY, INC.	:	
VS.	:	CIVIL ACTION
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

CIVIL JUDGMENT

BEFORE Honorable Norma L. Shapiro.

AND NOW, this 21st day of August 1979, in accordance with the Special Verdict of the Jury and the Direction of the Court,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff, Columbia Metal Culvert Company, Inc., and against the Defendants, Kaiser Aluminum and Chemical Corp. and Kaiser Aluminum and Chemical Sales, Inc., in the sum of FIVE MILLION, FOUR HUNDRED AND FORTY-FIVE THOUSAND ($5,445,000.00) DOLLARS.

8/22/79 entered and copies:
Michael M. Baylson
Blank, Rome, Klaus & Comisky

BY THE COURT:

ATTEST: /s/
Ellen N. Starr
DEPUTY CLERK

bcc: Robert L. Price, Esquire
Civ 1 6/72

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JUNE 17th, 1981

INTRODUCTION

Post-trial motions in this antitrust litigation are before the court pursuant to a limited remand order of the United States Court of Appeals for the Third Circuit. Defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") move for a judgment notwithstanding the verdict or, in the alternative, for a new trial, following a jury verdict in favor of Columbia Metal Culvert Co., Inc. ("Columbia")[1] finding KACC and KACSI in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and awarding damages in the sum of $1,815,000. Judgment was entered for the plaintiff in the trebled amount of $5,445,000.

1. Upon liquidation of Columbia, all of its claims, rights and interest in this litigation were assigned to its shareholders, Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby; the current named plaintiffs were substituted as parties pursuant to Fed.R.Civ.P. 25(c) by the court's Order of May 30, 1980.

Columbia originally brought suit against KACC and KACSI and former Columbia salesman Robert A. Kennedy and the company he owned, Kennedy Culvert and Supply, an independent distributor of culvert and drainage pipe manufactured by KACSI. The complaint alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §15. At the jury trial held before the Hon. Edward N. Cahn, a directed verdict for all defendants was entered at the close of Columbia's case on the ground that Columbia had not made out a *prima facie* case of conspiracy in restraint of trade between KACC/KASCI and the Kennedy defendants. The district court further found that the product market was not limited to aluminum culvert pipe as Columbia had maintained but included culvert pipe whether made from either aluminum or steel. Since the Kaiser share of the aluminum and steel culvert pipe market was concededly not significant, the court held that Kaiser could not have monopoly power. The court further found that no *prima facie* violation of Section 3 of the Clayton Act had been proven. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum and Chemical Corp.*, Civil Action No. 74-122 (July 20, 1977).

On appeal by Columbia, the Third Circuit reversed in part and affirmed in part. The Court affirmed the grant of a directed verdict in favor of the Kennedy defendants on the issue of conspiracy. The Court also upheld the district court's finding that no *prima facie* case of a Clayton Act violation had been proven. However, the grant of a directed verdict in favor of defendants KACC and KACSI was reversed. The Court held that:

> (1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert only rather than culvert of either aluminum or steel;
>
> (2) There was sufficent evidence to go to the jury on the charge that KACSI and KACC violated §2 of the Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market; and

(3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of §1 of the Sherman Act.

Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 37 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

A bifurcated trial before this court resulted in a determination of defendants' liability in answer to special interrogatories (attached to this opinion as Appendix A); the jury found that the relevant product market was for aluminum culvert pipe, that defendants KACC and KACSI had monopolized, attempted to monopolize, and conspired to monopolize this market in violation of Section 2 of the Sherman Act; that KACC and KACSI had conspired in violation of Section 1 of the Sherman Act; and that Columbia had been injured by the unlawful acts of KACC and KACSI.

The jury then awarded damages in the amount of $1,048,000 for lost profits, $710,000 for the destruction of Columbia as a going concern, and $57,000 for the cost of extra metal (relating to Columbia's spiral machine for making pipe), a total of $1,815,000, which trebled resulted in a judgment of $5,445,000. Following a second appeal, the case was remanded to the district court for disposition of post-trial motions.[2] (Docket Entry #426). Columbia having won a jury verdict at trial, we consider the following facts in the light most favorable to plaintiff.

Columbia was a company specializing in the manufacture and marketing of aluminum culvert pipe with a plant in Vineland, New Jersey. KACC manufactures aluminum sheet and coil from which aluminum culvert pipe is constructed and conveys these materials to its wholly-owned subsidiary KACSI, which in turn sells the sheet and coil to pipe manufacturers such as Columbia. KACSI also fabricates and sells aluminum culvert

2. A direct appeal was taken because defendants failed to file post-trial motions timely. The Court of Appeals, upon defendants' motion, allowed a limited remand to this court to have the benefit of the trial judge's views upon the issues in contention.

pipe itself in competition with the fabricators to whom it supplies sheet and coil.

These three entities had a successful business relationship for many years during which Kaiser was Columbia's main material supplier. Beginning in 1971, a four-pronged effort took place to put Columbia out of business in retaliation for Columbia's placing of aluminum orders with Reynolds Aluminum. This KACC/KACSI effort included a refusal to sell to Columbia, a decision to locate a new culvert manufacturing plant within fifty miles of Columbia's plant, setting up Robert A. Kennedy, Columbia's best salesman, in business as an independent distributor of KACSI products, and a "price squeeze" by KACC and KACSI, accomplished by transferring sheet and coil from KACC to KACSI below cost. This allowed KACSI to make a profit on sales of pipe at prices which Columbia could not match; the price of aluminum was increasing and the supply of the metal was severely limited.

The Kaiser defendants move this court for a judgment notwithstanding the verdict, on the ground that Columbia produced insufficient evidence to support the verdict in several material respects. In the alternative, defendants move for a new trial on the ground that the verdict was contrary to law, against the weight of the evidence, and that the court erred in certain evidentiary rulings, in jury instructions, and in submission of certain interrogatories to the jury.

In ruling on a motion for judgment N.O.V., "it is the duty of the trial court to take that view of the evidence most favorable to the party against whom the motion is made, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for him." 6A *Moore's Federal Practice* §59.08[5] at pg. 59-152 (1979). On the other hand, a motion for new trial, on the ground that the verdict was against the weight of the evidence, is addressed to the sound discretion of the trial court. *Id.*

POST-TRIAL MOTIONS – LIABILITY

Defendants' contentions must fail in view of the Circuit Court's opinion in *Columbia Metal Culvert Company, Inc. v. Kaiser Aluminum & Chemical Corporation*, 579 F.2d 20 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) and the doctrine of the law of the case.

As noted in *Otten v. Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976):

> This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, *unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal*, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless the decision is clearly erroneous and works manifest injustice. (emphasis supplied, citations omitted).

See, e.g., United States v. American Bag & Paper Corp., 609 F.2d 1066, 1067, n.3 (3d Cir. 1979) (determination by panel of Court of Appeals was law of the case and later panel was bound by it); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 482 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979) (Court of Appeals' prior opinions were law governing the case with respect to question of whether it was permissible to remand plaintiff's due process claims to district court and district court's observations on remand were of no effect); *Chlystek v. Kane*, 540 F.2d 171, 173 (3d Cir. 1976) (Court of Appeals governed by law of the case from prior appeal with respect to whether a substantial federal question was present); *Spock v. David*, 502 F.2d 953, 955 (3d Cir. 1974), *reversed on other grounds*, 424 U.S. 828 (1976) (on essentially the same record as was before the Court of Appeals prior to remand, both the district court on remand and the panel of the Court of Appeals on appeal following remand were bound, with respect to issue decided by the Court of Appeals prior to remand, by decision on that issue as the law of the case); *A.M. Webb & Co. v. Robert P. Miller Co.*, 176 F.2d 678, 680-81 (3d Cir. 1946) (on

trial after remand of case, questions settled by Court of Appeals could not be relitigated); *Moyer v. Aetna Life Insurance Co.*, 126 F.2d 141, 143 (3d Cir. 1942) (law of case on prior appeal as to sufficiency of the evidence on certain points precluded reconsideration thereof upon defendant's appeal of district court denial of judgment N.O.V. after second trial).

This court is bound by the Third Circuit's decision on issues presented and decided explicitly or implicitly in the prior appeal. *See, Todd and Company, Inc. v. SEC*, 637 F.2d 154 (3d Cir. 1980). For this reason we reject Kaiser's initial contention in its brief in support of post-trial motions, that because KACSI is "wholly owned and controlled" by KACC (Defendant's Brief in Support of Motions at 2), the two corporate entities are incapable of a conspiracy for lack of the requisite plurality of actors. The Third Circuit explicitly rejected this argument as "not well-founded in law," and reaffirmed the viability of the "intra-enterprise conspiracy theory" as applied to separate corporate entities. *Columbia Metal, supra* at 33. *See, Cromar Company v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 511 (3d Cir. 1976) (absence of the appearance of competition between parent corporation and wholly-owned subsidiary not a bar to Section 1 Sherman Act liability.) This court may not reconsider that determination.

A simililar fate befalls Kaiser's contention that there was insufficient evidence to support a finding of an unlawful conspiracy between KACC and KACSI, insufficient evidence to support a finding that KACC or KACSI had a specific intent to monopolize or to wilfully maintain monopoly power, insufficient evidence to support a finding that the relevant product market was aluminum culvert and drainage pipe alone, and insufficient evidence to support the court's charge on the price squeeze issue. The Third Circuit explicitly found the evidence sufficient to allow a jury to find for Columbia on each of these points. *Columbia, supra* at 37.

The law of the case doctrine precludes a reconsideration of that determination unless the evidence at the second trial was *substantially* different from that considered by the appellate court. *Otten, supra.* However, the evidence which the Court of

Appeals found sufficient as to each of these points was substantially repeated in the second trial.

Product Market

The evidence persuasive to the Third Circuit on the product market issue, *Columbia, supra* at 29-31, essentially repeated itself at the second trial. For example, there again was testimony that aluminum is a specialty material[3] and that there are specialized vendors of aluminum products.[4] Several witnesses testified that the physical properties of the three types of manufactured culvert pipe, steel, concrete and aluminum, differ significantly.[5] Because of these differences, evidence at the second trial again showed that specifications for construction projects require one type of culvert rather than another.[6] From this evidence a jury might infer that distinct markets exist for aluminum, steel and concrete pipe, at least from the contractor's point of view. *See, Columbia, supra,* at 28.

The record here shows, as did the record before the Court of Appeals, that a jury would not act unreasonably in finding that, "patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market." *Columbia, supra* at 28. Again, there is testimony that price was not a crucial factor in these engineering decisions[7] and

3. *E.g.,* N.T. 248 (Bonjorno) (". . . aluminum was always a specialty product. It was during the sixties, and it was during the early seventies, and it was at the period and point in time that we're talking about. . . ."); N.T. 681 (Arvay) (". . . aluminum again becomes a very highly specialized product. . . ."); *See,* Plaintiff's Brief in Opposition to Defendants' Motions at 9.

4. *E.g.,* N.T. 2848 (specialized in aluminum "as far as a storm drainage product. . . . "); N.T. 17 (Bonjorno).

5. *E.g.,* NT. 874, 879, 882-883, 885-886, 888-889, 893-894 (Elam). *See,* Plaintiff's Brief in Opposition to Defendants' Motions at 9.

6. *E.g.,* N.T. 904, 915, 916 (Elam); N.T. 1698 (Price).

7. *E.g.,* N.T. 919 (Elam) (". . . you are going to specify that product in most instances where price is not even a factor . . ."); N.T. 680 (Arvay) (". . . as far as the price situation is concerned, that is not the concern to them . . . ."); N.T. 1701 (Price); *See,* Plaintiff's Brief in Opposition to Defendants' Motions at p. 8.

that the three culvert products are neither interchangeable nor in competition from an engineering standpoint.[8]

Defendants also argue that steel and aluminum culvert may share the same production facilities as an indicia of products in the same market for Sherman Act purposes. The fact that the same production facilities can be used to turn out steel and aluminum culvert and even the fact that companies often manufacture both products is insufficient to preclude the existence of separate markets as a matter of law; *Columbia, supra,* at 29 n.30.

Defendants vigorously assert that the evidence does not support the jury's finding of an aluminum culvert product market. (*See,* Defendants' Brief in Support of Motions at pp. 99-109). Defendants point to extensive testimony, particularly that of defendants' expert, Dr. Epstein, supportive of their view. But the jury rejected defendants' testimony on these points and accepted that of the plaintiff; the Court of Appeals has already determined that plaintiff's evidence would reasonably support such a jury finding.

Thus this court accepts the jury finding of an aluminum culvert pipe product market, as sufficiently supported by the evidence.

Unlawful Conspiracy Between KACC and KACSI

The evidence found sufficient to prove unlawful conspiracy between the defendants, *Columbia, supra* at 34-35, was also placed before the jury in the second trial. Again there was evidence that KACC and KACSI combined to impose a price squeeze. For example, there was evidence from which the jury could infer that Collins of KACSI had no part in setting the

8. *E.g.,* N.T. 1408 (Chafin) (". . . it [aluminum] has inherent characteristics which are different from the other materials . . .); N.T. 918 (Elam):

> "Q. Now taking your professional group, the Drainage Engineers and engineers who design drainage systems and design culvert and specify different commodities of culvert, in your opinion, does that group view these products, steel, aluminum and concrete as interchangeable?"
>
> "A. No, I don't think they do."

specification price of coil, which was a KACC price (N.T. 171, 1972, 1957), that Collins was chastised by KACC for not getting prices up high enough (P-950, N.T. 2277, 2281, 2560), that Collins reported to the Sheet and Plate Division of KACC (N.T. 2307, 1718-20), that someone higher than Collins was responsible for the price increase crucial to this litigation (N.T. 1972), that KACC transferred coil to KACSI below cost (N.T. 1964, P-823) and that Collins' request for a plant in New Castsle, Delaware was approved by KACC (N.T. 1792, 2114, 2317, 2372, 1976, P-204, 210). *See,* Plaintiff's Brief in Opposition to Defendants' Motions at pp. 12-13. From this and other information adduced at trial, the jury might again infer that "the pricing policies of KACSI were not independent . . . but rather arrived at jointly with KACC." *Columbia,* 579 F.2d at 35. Although there was evidence from which a contrary finding might have been made (*see,* Defendants' Brief in Support of Motions at pp. 32-59), we find the evidence was sufficient to support the jury's conclusion that KACC and its wholly-owned subsidiary, KACSI, conspired in violation of the Sherman Act.

Intent to Monopolize

Defendants argue that plaintiff's evidence was insufficient to support the jury's finding that the Kaiser defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act (*see,* Defendants' Brief in Support of Motions at pp. 60-99). Judge Cahn's directed verdict for defendants on this issue at the first trial resulted from his related finding that steel and aluminum, rather than aluminum culvert pipe alone, must constitute the relevant product market. The Third Circuit, as discussed above, found that it was not unreasonable to conclude that culvert pipe alone constituted a relevant market, and therefore that "the foundation of the directed verdict on the §2 count collapses." *Columbia,* 579 F.2d at 31. The Court of Appeals also stated that there was sufficient evidence to infer that KACSI, an entity controlling 80% of the market, attempted to drive Columbia out of business. *Columbia,* 579 F.2d at 31. That same evidence persuasive to the Court of Appeals was

presented to the jury at the second trial. Holmes Collins' threat to place an aluminum culvert plant near Columbia if Columbia purchased from Reynolds, and the later placement of a plant in New Castle, Delaware (N.T. 1228) that was originally planned for Virginia, (N.T. 1533, 1540-1541, 1730), were submitted to the jury. Again, there was evidence that, "transportation of culvert is a significant item of expense for the product in question and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery" (*Columbia, supra* at 31), from which the jury might infer intentional harm caused Columbia by Kaiser's placement of its plant (N.T. 2317-2318, 2840). Again, an inference could be drawn from evidence that the Delaware KACSI plant sold culvert at lower prices than other plants even though Delaware costs were no lower (N.T. 1734, 2544-2545), that KACC transferred sheet and coil to KACSI at an accounting price less than production cost and well below market price (N.T. 1964, 3654), and that Collins of KACSI extended credit to Kenned*y*, formerly a Columbia salesman, against the recommendation of the KACSI credit department (N.T. 1849-1863, 2525-2529, 2842-2849, 2854, 2997, Exhibits P-75, P-24, P-5). The Arvay testimony, specifically noted by the Third Circuit, *Columbia, supra* at 31, n.43, again supported plaintiff's theory (N.T. 719, 729, 752). Finally, an inference that Kaiser controlled more than 80% of the relevant market was again reasonably supported by the evidence. (N.T. 73-75, 780, 1261, 1809, 1810, 1814, 2509, Exhibit P-201). Therefore, the evidence was sufficient to support the jury's conclusion that the defendants monopolized or attempted to monopolize in violation of Section 2 of the Sherman Act.

In summary, on the liability issues, the evidence on retrial was not substantially different from that considered by the appellate court and must be deemed sufficient to support the jury's finding in favor of the plaintiff. Moreover, not only was the evidence sufficient, the court in the exercise of its discretion does not find the jury's determination so against the weight of the evidence as to shock the conscience of the court. Therefore, a new trial would be denied on all issues of liability. The court

has carefully considered all other grounds raised by defendants in their motion for judgment notwithstanding the verdict and, with the exception of ground eleven (11) relating to damages and discussed *infra*, determines them to be without merit.

DAMAGES

The trial of this matter having been bifurcated, after the jury verdict on liability against defendants, two days of testimony on damages followed; the jury, again upon answers to special interrogatories (attached hereto as Appendix B), then found damages in favor of plaintiff in these amounts: 1) $57,000 for increased costs of metal; 2) $1,048,000 for lost profits; and 3) $710,000 for the reduction in the value of Columbia as a going concern. The total damage award by the jury was $1,815,000. The jury's award was trebled in accordance with the remedy provided in Section Four of the Clayton Act, 15 U.S.C. §15; the final judgment in plaintiff's favor is in the amount of $5,445,000.

Defendants raise numerous objections as to the award of damages.

Causation

Defendants argue that plaintiff did not establish the requisite causal link, under Section Four of the Clayton Act, between the financial damage suffered by Columbia and the defendants' violation of the antitrust laws. Defendants assert that they are entitled to judgment in their favor if the damages to the plaintiff were caused in whole or in part by factors other than defendants' violations of the antitrust laws.[9] Defendants assert that Joseph Bonjorno, Columbia's chief witness and shareholder, on cross-examination identified several reasons, other than defendants' activities, for losses suffered by Columbia during the relevant time period. Among those causes cited by defendants are: the recession in the construction industry,[10] a nationwide aluminum

9. *See,* Defendants' Brief in Support of Motions for Judgment N.O.V. or for a New Trial at p. 11 (citing cases).
10. *See,* N.T. 3903-3905.

shortage,[11] the inability of Columbia to obtain price protection from suppliers,[12] and the unstable financial condition of Columbia's chief financial backer, George Kerr.[13]

Damages attributable to an antitrust violation are recoverable even when factors other than defendant's wrongful acts alone may have contributed to the plaintiff's injury. 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] (1978). In this case there was sufficient evidence, if accepted by the jury, to show that Columbia's business decline was caused by Kaiser's illegal activity. Mr. Bonjorno stated repeatedly, both on direct and on cross-examination, that the injury to Columbia was caused by Kaiser's illegal activity.[14] He also stated that in projecting damage figures he had considered the legal competition of others in the marketplace. (N.T. 3971). He further stated that the damage projections did not go beyond a point where it was simply too difficult to determine "who was responsible for what" (N.T. 3858). When cross-examined as to other possible causal factors in Columbia's decline, Bonjorno either asserted that these factors were not significant or that Kaiser's illegal activity had made Columbia particularly vulnerable to troubles that, absent such wrongdoing, would not have created financial problems.[15] The jury had before it, through this adept cross-examination, those other factors. However, the jury found that Kaiser's illegal activity caused the financial harm suffered by Columbia. Damages for injury by antitrust violations may be implied even though other factors may have contributed to the injury. *See, Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-265 (1946); *Switzer Brothers, Inc. v. Locklin,* 297 F.2d 39 (7th Cir. 1961), *cert. denied,* 369 U.S. 851 (1962). Here, plaintiff did show, with the requisite reasonable certainty, an injury in consequence of Kaiser's conduct. *See, Pitchford v. PEPI, Inc.,* 531 F.2d 92 (3d Cir. 1976), *cert. denied,* 426 U.S.

11. *See,* N.T. 3908, 3909.
12. *See,* N.T. 3911-3918.
13. *See,* N.T. 3919, 3920.
14. *E.g.,* N.T. 3864, 3865, 3902, 3904.
15. *E.g.,* N.T. 3907, 3908, 3910, 3912, 3913.

935 (1976). Judgment notwithstanding the verdict on causation would be improper.

Duplication in Damages Award

Defendants assert that, when the jury returned a verdict of $1,048,000 for loss of profits during 1974-1977 and $710,000 for the reduction in the value of plaintiff's business as a going concern as of May 1, 1977, Columbia was awarded a double recovery for the same loss. Defendants' theory for this duplication argument is not clear but seems to include these contentions. Defendants first argue that plaintiff's recovery of lost profits in this action together with the amount received from the sale of Columbia's assets to Howmet in 1977 for $574,000 fully compensated plaintiff for its losses because the value of Columbia as a going concern was the amount received from Howmet at the time of sale. Receiving damages for business as a going concern under this theory duplicates the money paid Columbia by Howmet in 1977 *not* the lost profits awarded by the jury at trial. A part of this argument is that either Howmet paid for Columbia's total going concern value as of May, 1977 (including goodwill) or that Howmet bought only Columbia's assets; i.e., all Columbia had left at that time, as Columbia itself asserts. If the latter is the case, Kaiser argues that projected lost future profits should not add to a going concern value since Columbia, defunct as of 1977, could have no future profits.

Defendants next contend that the method of calculating the damage to Columbia as a going concern caused a duplication between the two theories of damage recovery. Defendants state that the same figures used to calculate past lost profits, were used to project Columbia's profits into the future, post 1977, to arrive at a going concern value. (A going concern value indirectly reflects future profits as "[t]he current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings." *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, 1023 (D.N.J. 1976), *reversed on other grounds*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) *rehearing denied*, 438 U.S. 908

(1978).) This, defendants maintain, created an impermissible duplication since the same figures establish both damage theories.[16] Finally, defendants argue that a recovery for going concern value and lost profits is generally not allowed.

We will deal with the last contention first. As noted in 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[1] (1978), "there are three types of damages that a successful antitrust plaintiff may recover under Section 4: (1) increased costs; (2) lost past net profits; and (3) reduction in the value of the business. *Absent unique circumstances, these three types are not duplicative of each other.*" (emphasis supplied). Numerous cases support this general proposition. *See, Story Parchment Co. v. Patterson Parchment Paper Company*, 282 U.S. 555, 561 (1931) ("[t]he trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents' and (2) the extent to which the value of the petitioner's property had been diminished as the result of such acts."); *Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009, *supra*, (involved damages for both lost profits and going concern value); *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1081 (2d Cir. 1980) ("[t]he district court ruled that ABP was entitled to compensation for two categories of injuries—lost profits on sales that were prevented prior to the termination of its Sony dealership, and the reduction in the value of ABP's business resulting from the termination"); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (lost profits and goodwill loss, determined in part by reference to potential for future profits); *Albrecht v. Herald Co.*, 452 F.2d 124 (8th Cir. 1971) (sufficient compensation included damages in amount of profits lost prior to the forced sale of the business *plus* its full market value, absent the illegal practices). Thus in this case, absent some unique circumstance, it is clear that plaintiff is entitled to both the lost past profits as of the time of the sale to Howmet and the value of the business, as it would

16. *See*, Defendants' reply brief at P. 51.

have been absent defendants' violation of law, in May of 1977 upon Columbia's termination.

Defendants claim that the method of calculating going concern value created duplication in the damages award since going concern value was calculated, in part, by using the past lost profit figures in order to project potential future profits. Defendants assert that this method allowed plaintiff to recover its lost profits twice. However, several cases, discussing damages calculations in the antitrust area, have explicitly or implicitly endorsed this method of determining going concern value. For example, in *Eiberger, supra,* at pp. 1081-1082, n.25, the court stated:

> 25. Although it is unclear, Sonam may also be arguing that the district court erred when it included in the one-year base period figures an amount for profits that ABP would have earned on sales lost as a result of Sonam's intimidation. Such an argument is clearly incorrect. ABP is entitled to an award that covers all of the profits it would have earned but for Sonam's violation: these include both the profits lost while ABP was still an authorized dealer, and the profits it would have earned after that point, which when capitalized equal 'going concern' value of the lost portion of ABP's business. *See, Farmington Dowel Prods. Co. v. Forster Mfg. Co.,* 421 F.2d 61, 80-82 (1st Cir. 1970). *To exclude lost profits from the base period figures used to project the latter component would be to reduce plaintiff's award for the later period precisely because defendant's intimidation had been successful in the base period. Such a reduction would obviously be improper.* (emphasis supplied).

Similarly, in this case, it was appropriate that the calculation of Columbia's value as a going concern included as its base figure, not the past profits depressed by defendants' violations, but the past profit history as it would have been but for the violation.

Of similar import is *Copper Liquor, Inc. v. Adolph Coors Co., supra* at 579 n.9, where the court described the calculation of a retail liquor store's goodwill value, in a case where plaintiff

sought both lost profits and good will:[17]

> 9. Relying on the assumption that the store reduced its markup from 25 percent to 15 percent in 1966, Green calculated the store's goodwill value by adding the lost gross profits for each year of the store's operation to the net profits for the store as they appeared on the store's corporate income tax returns. The sum of lost gross profits and net profits for the four years, 1967 to 1971, was identified as adjusted net income. Adjusted net inome, in the amount of $100,046, was divided by the number of years to obtain average net income. Mr. Green then subtracted from average net income the store's return on capital computed at 6 percent per year to derive average net income after return on investments. This figure, $21,980, was multiplied by five to arrive at a goodwill value of $109,899.

Again past lost profits were taken into account in the figure from which goodwill was projected. Finally, by way of example, the district court in *Glauser, supra* at 1023 n.14, made the following observations on this point:

> 14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years *and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct.* (emphasis supplied).

In the instant situation, then, we find no merit to defendant's contention that the method of computation used in this case created a duplication.[18] Rather, by adding Columbia's

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17. "Valuing a business's goodwill, of course, is a subjective determination that takes into consideration factors such as a business's age, profit history, customers, and *potential for future earnings.*" (emphasis supplied). Copper Liquor Co., *supra,* at 579 n.8.

18. Defendants' cited cases can be read to support plaintiff's position. Rea v. Ford Motor Company, 497 F.2d 577 (3d Cir. 1974), *cert. denied,* 419 U.S. 868

estimated profit figures in those prior years and then projecting forward for future profits, Columbia quite appropriately measured its value as a going concern from its estimated 1977 condition had there been no prior damage caused by defendants. Necessarily, this method creates a projection based upon a projection but it is defendants' prior misdeeds that make such a formulation necessary.

Finally, we consider defendants' contention that Columbia's recovery for going concern value duplicated the amount received in 1977 when Columbia transacted its sale to Howmet. Plaintiff asserts that the transaction with Howmet was a sale of assets only, since Columbia, having been destroyed as a business by Kaiser, had no good will value left. Both Bonjorno[19] and Dr. Kuehn so testified.[20] If this is the case, Kaiser argues that

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NOTES *(Continued)*

(1974), involved a finding of double recovery under the Automobile Dealer's Act where the damages for lost future profits did not reflect the fact that plaintiff had sold certain assets for $60,000. Defendants cite it for that proposition. However, the court in Rea, at 587 n.19, stated that "neither the trial judge's instructions on damages nor Dr. Staelin's estimate made mention of or took into account the benefit 22 Ford received from the cash. . . ." Clearly the Howmet purchase price was taken into account in this case; defendants' in their Reply Brief at p. 51 note Dr. Kuehn's assumptions regarding the Howmet sale in the going concern value computation. Also, in Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969), *supp. order*, 421 F.2d 91 (1st Cir. 1979), cited by defendants, the court allowed plaintiff to recover both its lost profits to the date it went out of business and the going concern value of the plaintiff on that date.

19. N.T. 3864 (Bonjorno):

"A. Well, we--as long as we were operating we had our good name. We had our reputation and our ability to maufacture a high quality product, our ability to manufacture a high quality product, our ability to work and get our product specified. This as all part of Columbia Metal and its good name in the aluminum culvert pipe industry in the trading area, and they effectively destroyed this.

Q. Who is they?

A. Kaiser Aluminum."

20. N.T. 4041 (Kuehn):

"Q. Well, do you make an assumption as to what the actual value was as a going concern on May 31, 1977?

there was no reasonable prospect that Columbia would have earned profits in the future. However, Columbia's value as a going concern, that is its market value to Howmet, would certainly have been greater if its goodwill, and thus its potential for future profit, were intact.[21] If Howmet paid only for tangible assets, Columbia did not receive the worth of its business absent the violation which destroyed its goodwill. If Columbia indeed had no reasonable prospect of future profits, that indicates more damage to Columbia, not less damage to its going concern value.

As an alternative characterization, defendants assert that whatever intangible value Columbia had, assuming it had some, was paid for by its 1977 purchase by Howmet. It was plaintiff's express assumption that Howmet bought only tangible assets (N.T. 4041) and that its projection of ". . . the value of the business was computed in terms of whether the rates of return from the operation of this business in the absence of damage produced or would have produced a return in excess of the profits that might be expected from the tangible assets alone. In other words, was there additional profit that would then be attributed to intangibles which would indicate some value of good will relative to the operation of the business." (N.T. 4039-4040). *Compare*, *Pitchford v. PEPI, Inc.*, 531 F.2d 91 (3d Cir. 1975) (failure to deduct Mr. Pitchford's salary as a cost of

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A. Yes.

Q. What is that?

A. Well, the assumption is that the value of the firm on that date was limited to physical assets, and consequently that there was no operating value beyond the sheer value of the assets that existed.

Q. And based on what you know about this case, is that a reasonable assumption?

A. Given that--given the actual operation of the firm in the previous years in the damaged state, I would say yes."

21. *See*, Copper Liquor, Inc., *supra*, at 579 n.8:

"According to Cook's expert, Wayne Peters, goodwill is the amount that a purchaser would be willing to pay for a business *over and above the value of the business's tangible assets*. Valuing a business's goodwill, of course, is a subjective determination that takes into account factors such as *potential for future profit*." (emphasis supplied).

operation from data used to project potential earnings for the purpose of evaluating the lost going concern value of Pitchford created a double recovery).

On cross-examination, Dr. Kuehn, confronted with the purchase agreement between Howmet and Columbia, which allocated $16,000 of the purchase price for intangibles,[22] stated that amount should be subtracted from certain of his estimates, since his projections assumed the Howmet sale involved assets only.[23] Whatever amount was actually received for intangibles must be subtracted from the estimates to avoid an award of damages for an amount that is duplicative in the sense that it has already been recovered.

Increase in Metal Costs

Plaintiff claimed damages for lost profits for the years 1974, 1975 and 1976 but in addition made a specific claim for extra costs attributable to an increase in the amount of aluminum coil used in 1971, 1972 and 1973; plaintiff contended this increase in metal cost was caused by the misrepresentations of defendants concerning the gauge of aluminum Kaiser would continue to use. The Stamco machine plaintiff installed in the spring of 1970 utilized a 2-inch gauge because Kaiser used that gauge; the rest of the industry used a 2-⅔-inch gauge. Kaiser, which had used 2 inch, then converted to 2-⅔ inches; plaintiff contends that Kaiser concealed its intention to do this to put plaintiff at a competitive disadvantage. This had been presented to the jury

22. Corporate name and covenant not to compete.

23. N.T. 4149 (Kuehn):

> "According to the figure I just saw, the purchase price of the tangible assets apparently would be $564,000 and consequently, if I understand it correctly, $16,000 should probably be subtracted from the various estimates presented here on the bottom lines for both the capitalization at 15% and the capitalization at 20%."

However, Dr. Kuehn also indicated that the two items on the intangibles line of the purchase agreement actually had no worth. *See*, N.T. 4146 (corporate name); N.T. 4147 (covenant not to compete). (For the other inadequacies of Dr. Kuehn's testimony, see N.T. 4018-4019, 4050-4051, 4089, 4092-4093, 4108-4109, 4111.)

during the trial on liability, not as an antitrust violation in itself but as a part of a pattern of conduct from which retaliatory conduct could be inferred. Plaintiff admitted it could not isolate damages for other aspects of its proof on retaliatory conduct but urged that a finding of specific damages for extra use of coil was appropriate. Because plaintiff stated to the jury that damages would be claimed only for 1974, 1975 and 1976, the court was in error in allowing the extra cost of metal for prior years to go to the jury as a separate item of damages; that plaintiff was able to isolate it as a matter of proof (N.T. 3981-3995) is not a sufficient reason to allow it as an item of damages in the context of the trial as a whole. Therefore, the award of $57,000 ($171,000 trebled) is set aside and the defendants' motion for judgment notwithstanding the verdict is granted as to that amount.

Sufficiency of the Evidence as to Amount of Damages

We recognize that once the fact of injury has been proven, the burden on the antitrust plaintiff to establish the "precise amount of damages is not as great as in other kinds of lawsuits." 15 ANTITRUST LAWS AND TRADE REGULATION §115.01[2] at 115-5 (1978). *See*, *J. Truett Payne Co. Inc. v. Chrysler Motors Corporation*, 49 U.S.L.W. 4516 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (less rigid standard of proof with respect to amount of damages caused by an antitrust violation); *Hobart Brothers Co. v. Malcolm T. Gilliland Inc.*, 471 F.2d 894, 902 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973) ("[i]n an anti-trust case the burden on the plaintiff to prove the amount of damages is less severe than the burden to prove the fact of injury . . . ."); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 796 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971), *rehearing denied*, 404 U.S. 877 (1971) ("The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections . . . . "). However, a plaintiff must offer proof as to the extent of injury, showing that the damage involved is measurable in dollars. *See*, *Deaktor v. Fox Grocery*

Company, 475 F.2d 1112 (3d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973). Further, courts have stated repeatedly that the measure of damages may not be based upon mere guesswork, speculation, or conjecture. *E.g.*, *Bigelow v. RKO Radio Pictures, Inc.*, *supra*; *Story Parchment Co. v. Paterson Parchment Paper Co.*, *supra*; *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

Although plaintiff did show economic injury in consequence of defendants' conduct, the evidence presented by Columbia as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only. The evidence presented by Columbia's two damages witnesses, Bonjorno and plaintiff's expert witness on damages, Dr. Alfred Kuehn, was incomplete, confusing and generally lacking in probative value. The factual basis of the projections, predictions and calculations presented by them was never clear from the testimony.

Plaintiff estimated damages sustained in lost profits and in the decline in value of the business as a going concern by using four projection Methods (Methods C, D, E, and F). Method C (P-3012), projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while method E (P-3014) used Kaiser sales from the New Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing.

The testimony of an antitrust plaintiff who is an owner or officer of the damaged business may be sufficient to support a jury verdict on damages where the owner is qualified by experience and position to make damages estimates. *See, generally, Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 122, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969) (Zenith's officers, experienced businessmen, testified that repressive effects on Zenith were due to patent pool; no basis in record for refusing to accept testimony of the two officers as probative evidence);

Greyhound Computer v. International Business Machines, 559 F.2d 488, 507 n.41 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (most of the damages testimony came from Greyhound's president; where the record reflects his competency and the factual basis for his conclusions, an interested witness may testify as to the amount of damage and it is for the jury to determine the weight to be accorded his testimony); *Kestenaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (wholesale distributor's estimation of good will value of his business admissible in antitrust suit as an owner is competent to give his opinion on the value of his property; weight and credibility given owner's testimony is generally for the jury); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 394 (9th Cir. 1957), *cert. denied*, 355 U.S. 835 (1957) ("We do not hold or imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions. . . .").

But an inexperienced owner using purely speculative bases for his estimations of damage may provide testimony of such minimal probative force as to warrant a judge's refusal to submit the issue to the jury. *See, Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D.Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961, *cert. denied*, 369 U.S. 839 (1962). It follows that such testimony would justify the grant of a new trial in the exercise of the court's discretion.

We do not find that Mr. Bonjorno was an inexperienced owner who was not qualified to make damage estimates. Bonjorno started Columbia in 1959 and performed proprietary, managerial and sales functions from Columbia's beginning until its assets were sold in 1977. However, we do find the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy.

For example, Bonjorno estimated Columbia's return on sales at 17.6% for 1974, 12% for 1976 and 8% for 1977, all significantly higher than that of any previous year of Columbia's

operation; the previous high was only 5.8%. Bonjorno's explanation for this increase demonstrates the minimal evidence upon which this five million dollar verdict rests:

N.T. pp. 3959-3960:

"Q. What was the reason why you projected so much greater profitability in 1974 than you had experienced in your entire history?

A. A number of reasons, Mr. McElroy.

Number one, we would have had a much lower metal cost due to the new configuration. The fact that we were making standard corrugated pipe meant that the material costs would be down by approximately 4 to 5%.

Q. All right.

A. We now were in a position to offer perforated pipe made on our own perforating mill, which would have been a highly profitable product, also, and would have given us an access to other markets.

It would have also given us a much higher percentage of profit in those areas that were remote to southern New Jersey, because the prices were better in areas away from southern New Jersey than they were in the southern New Jersey area, so that we felt we would have a substantially greater margin of profit on the sales that we projected.

Q. So that you would have increased your profitability from 2.6% to 17.6% in one year? That's an increase of 15%.

A. I thought that was reasonable."

N.T. pp. 3958-3959

"Q. You've projected, in 1974, $1,805,569 in sales and you have an income of $318,683.

Do you know what that percentage is?

A. It looks like its around 15%. I'm not sure without calculating it.

Q. It is 17.6%. 17.6%.

Now, on Exhibit 3062 is there any year in which return on sales exceeded 10%?

A. No, there is not.

Q. Is there any year in which it exceeded 5%?

A. No, there is not.

Q. Isn't there one? 1971?

A. 5.8, I'm sorry.

Q. 5.8% and that was the best year, 5.8%?

A. Yes.

Q. And yet, you projected an income of 17.6% here?

A. Yes."

Also troubling was Bonjorno's estimate as to the pounds of metal sold in 1973 by Columbia, a critical figure since 1973 was the base year selected by the plaintiff as his starting point for all other damage calculations and projections. Although Bonjorno did state a figure before the jury (N.T. 3932: "[a]pproximately, I think they are about 2.3 or 2.4 million pounds, approximately."), the basis in fact or source of the figure was never explained. (N.T. 3932-3942). For example, at N.T. 3933,

"Q. And did you make a compilation for this trial so you could present it to the Court and jury of what the number of pounds were of metal that Columbia sold in 1973?

A. No.

Q. Didn't counsel or anybody--wasn't anybody assigned to go through the records to find out exactly what the total number of pounds was?

A. It's possible, but I didn't do it.

Q. And you are unaware of anybody else doing it?

A. It's possible that counsel may have done it. I am sorry, maybe I misunderstood your question.

Q. My question was, do you know whether anybody did it or not?

A. I don't know specifically.

That the jury was unpersuaded by the Bonjorno testimony is plain from its damage verdict on lost profits which virtually

cuts the Bonjorno estimate in half. The Bonjorno testimony of his hopes and aspirations fails to provide evidence of facts from which the jury's calculation may be logically and legally inferred.

There are similar problems regarding the damages testimony of the expert, Dr. Kuehn. Again, the problem of the pound figure for 1973 without a source appears.

"Q. Why did you convert it back to pounds?

A. Only to provide a base number for the subsequent calculation of other ratios.

Q. But the number of pounds doesn't represent what Columbia actually sold in 1973, does it?

A. I --

Q. That you calculated.

A. Since I am not sure that anyone knows precisely what the pounds are, it probably doesn't represent accurately, but it's the calculation that was obtained this way and which Mr. Bonjorno considered a fairly accurate estimate of what the actual figure was during that period.

Q. Did you review any of Columbia's books and records to determine whether or not your estimate of the number of pounds sold by Columbia for fiscal year ending May 1, 1973, was accurate or not?

A. I reviewed some records, but to the best of my knowledge--I am not sure whether one can determine precisely whether it's accurate or not. *I certainly didn't establish that it's accurate.*" (N.T. 4092-4093) (emphasis supplied).

The confusion with regard to that particular figure was merely symptomatic of the general confusion and ill-preparedness of the witness, which was admitted by plaintiff's attorney in his closing argument to the jury:

Dr. Kuehn I think was poorly prepared to defend that basic computation that he gave you. It took him too long and he should have been better prepared. (N.T. 4197).

While recognizing the importance of expert testimony in antitrust proof of damages, 16 A.L.R. Fed. 14, 22 (1973),[24] and the fact that Dr. Kuehn qualified as one competent to offer an opinion in such matters, we determine that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case. *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962) ("The leap required to derive any rational conclusion from the expert's data was too great to allow a jury to take.").

Of the methods for calculating plaintiff's damages, we have already considered Method F that relied upon the estimates of Joseph Bonjorno. Method C, that projected Columbia's sales based upon government figures on new housing starts and new highway construction, was completely repudiated by the testimony of plaintiff's expert. Dr. Kuehn could not explain the relevance, if any existed, of these figures to Columbia's business or to its losses:

"Q. And the Federal Government publishes statistics on new highway construction?

A. Data are published on both, yes.

Q. On both what?

A. Highway construction and housing.

Q. Now, the highway construction, that's new highways, isn't it?

A. That's correct.

Q. That does not include reconstruction, maintenance or repair, does it?

A. That's correct.

Q. And the housing starts are new housing starts?

A. It's based on new housing, yes.

Q. That would not include reconstruction or repair of existing storm sewers, for example?

A. That's correct.

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24. "Measure and Elements of Damages Under 15 USCS §15 Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages."

Q. Now, do you know what percentage of Columbia's business was in new highway construction?
A. *I believe very little.*
Q. Most of it was, in fact, in reconstruction and maintenance, wasn't it?
A. That's my understanding.
Q. Do you know whether there is any relationship between new highways and the use of culverts?
A. Well, new highways and aluminum culvert?
Q. Any culvert?
A. *I would assume there is some.*
Q. You assumed it?
A. *Yes, because at least most highways I see, you know, there tends to be some culverts.*
Q. And that's what you based your estimation of damages on, your assumptions, that when you go along the highway you see some culverts along the road?
A. I used this method as the first of four methods since certain data were here I certainly didn't think it was perfect.

I thought it might be related, but that is precisely why in my explanation of which of the varous methods I preferred *I listed this as probably the poorest of the four methods.*

I don't consider this necessarily a very good index." (N.T. 4050-4051) (emphasis supplied).

The remaining two methods, utilizing Kaiser nationwide sales (Method D) and Kaiser New Castle sales (Method E), were never adequately explained to the jury. (N.T. 4018-4019).

Although the "yardstick" measure of an antitrust claimant's lost profits, under which the claimant recovers the difference between his net profits during the damage period and the net profits earned in a comparable business unaffected by antitrust violations, is a valid method of estimating damages, 16 A.L.R. Fed. 14, 45 (1973), in this instance the evidence presented was insufficient to establish that the entities used were truly comparable or that the estimates were adjusted to reflect the

differences between the businesses compared. *See, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 69 F. Supp. 103, *affirmed*, 164 F.2d 1021 (3d Cir. 1946).

Lapses of this nature are frequent in Dr. Kuehn's testimony. Kuehn never could explain how the comparisons in Methods D and E were made in view of the fact that Columbia operated on a fiscal year and Kaiser operated on a calendar year (N.T. 4057-4068). Kuehn maintained that the calendar year fiscal year problem would make little difference, however he admitted that he had never calculated it to so determine. (N.T. 4089). Kuehn relied upon the 17.5% normal mark-up of former Columbia salesman, Robert Kennedy, in order to calculate Kaiser's average selling price per pound; however, this figure was not of record in the testimony on damages or liability. Kuehn had difficulty explaining why his calculation of damages for cost of goods sold included a variable cost equal to 11.17% of sales. (N.T. 4108-4109), why an interest expense factor of 7.5% was utilized, and how such interest rate was calculated. (N.T. 4111).

Although Dr. Kuehn's confusion is apparent from a reading of the transcript (N.T. 4003-4150), a reading does not make plain the great diffuculty this witness had in responding to questions. On numerous occasions, Dr. Kuehn was unable to answer an inquiry without referring to documents, was unable to find the appropriate figure within the relevant document, and when a figure was located unable to state how it was calculated or why it was used. All of this shuffling of paper and accompanying long silences occurred before the jury. At one point it was necessary to call a luncheon recess in order to give Dr. Kuehn sufficient time to answer a question posed upon cross-examination. The total effect was that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained.

We also recognize that a flexible standard of proof applies where the defendant's wrong doing, here the destruction of plaintiff's business, has made it impossible, as a practical matter,

for the plaintiff to produce a more precise figure, *see, Bigelow, supra* at 262-266, but in this case the brief trial on damages seemed almost an afterthought following the extended trial on liability. Plaintiff's action was originally instituted in 1974. The delay occasioned by the directed verdict for defendants at the end of the plaintiff's case at the first trial and the subsequent appeal prior to the instant trial on remand may be responsible for some of the deficiency in proof. It seemed obvious to the court that plaintiff's expert, a well-qualified and experienced witness, must have understood the basis for his conclusions when they were initially stated. However, on the witness stand as of the date of this trial, Dr. Kuehn was unable to explain, at least in an unconfused manner, the derivation of his figures or their basis in fact notwithstanding the time provided to him by the court for this purpose. Whatever the reasons for this inability, the trial court is convinced that the jury verdict could only be a product of confusion and speculation.

Mindful of the delay that has occurred snce the limited remand, and the economic loss occasioned to plaintiff thereby in the erosion of the money judgment due to the difference between legal interest and the market rate, we are reluctant to incur even further delay and have considered whether the delay itself is a reason not to disturb the verdict of the jury. We also gave serious consideration to ordering a remittitur, an action within the trial court's discretion where a jury awards an amount the court deems excessive. 15 ANTITRUST LAWS AND TRADE REGULATION §115.03[2] at p. 115-70 (1978); however, no reasoned basis could be found for setting an appropriate figure. The deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand.

Where there is no substantial indication that liability and damage issues are inextricably interwoven or that the jury verdict was the result of compromise of liability and damage questions, a second trial on the damages alone is proper. *See, Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970); *Darbrow v. Brown*, 255 F.2d 610 (3d Cir. 1958); 11 Wright and Miller, Federal Practice and Procedure §2814 (1973). In this bifurcated trial, it is clear there was no compromise of liability and damage

questions. The separateness of the trials is also substantial indication that liability and damage issues are not inextricably interwoven. The court has also considered whether hearing the evidence on liability is necessary to persuade the jury to award damages in an adequate amount and is convinced that the case on liability can be stated to the jury with the facts and inferences most favorable to plaintiff, consistent with the verdict in its favor. Both the plaintiff and defendants will benefit from this opportunity to present damage testimony to the jury in a clear and unconfusing fashion. In any event, fairness to the defendant requires no less.

For the above reasons a new trial as to damages only is granted. An appropriate Order accompanies this Memorandum.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. (a) Do you find from the evidence that there was a conspiracy between Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. in unreasonable restraint of trade? Yes X No ___

   (b) If your answer to 1(a) is yes, was the conspiracy in unreasonable restraint of trade a material and proximate cause of any injury to the business and property of plaintiff? Yes X No ___

2. (a) Do you find from the evidence that the relevant product market was: [CHECK ONE ONLY]

   (i) aluminum culvert and drainage pipe? X

   (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum? ___

   (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete? ___

   (b) If you find the relevant product market was (ii) metal culvert and drainage pipe, including pipe made of steel and aluminum, or (iii) culvert and drainage pipe, including pipe made of steel, aluminum and concrete, you should not answer questions 3 or 4; you have concluded your deliberations.

3. If you find in answer to Interrogatory 2 that the relevant product market was (i) aluminum culvert and drainage pipe, do you find from the evidence:

   (a) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. monopolized the aluminum culvert and drainage pipe market in that it had the power to control prices or exclude competition in the relevant geographic area which was willfully acquired or willfully maintained? or Yes ✓ No ___

   (b) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. conspired with regard to aluminum culvert and drainage pipe to control prices or to exclude competitors in the relevant geographic market? or Yes ✓ No ___

   (c) that Kaiser Aluminum & Chemical Corp. or Kaiser Aluminum & Chemical Sales, Inc. attempted to monopolize the aluminum culvert and drainage pipe market with the specific intent to obtain power to control prices or to exclude competitors and committed an act in furtherance of monopolization which had a dangerous probability of achieving monopolization? Yes ✓ No ___

4. If your answer to 3(a), (b), or (c) was yes, was any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of plaintiff? Yes ✓ No ___

You have now completed your deliberations.

The Foreperson will place his/her signature on the signature line below and add the date, and the jury will return to the Courtroom.

/s/ Flora Eikenkoetter

Foreperson

Date: 8/16/79

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLUMBIA METAL CULVERT CO., INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO BE ANSWERED BY THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reason of an increase in the usage of aluminum coil in 1971, 1972 and 1973?

   State such amount; or "None" in the following blank according to your finding. $ 57,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by profits lost for the years from June 1, 1973 through May 31, 1977?

   State such amount; or "None" in the following blank according to your finding. $1,048,000

3. In what amount, measured in dollars and cents, do you find from the evidence that Defendants caused damage to Plaintiff by reduction in the value of Columbia as a going concern as of May 1, 1977?

   State such amount; or "None" in the following blank according to your finding. $ 710,000

Flora Eiherenkoetter
Foreperson

Dated: 8/21/79
5:30 p.m.

KINDLY ADVISE THE MARSHAL WHEN YOU HAVE COMPLETED DELIBERATIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
	:	
v.	:	
	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of June, 1981, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. Plaintiff's Motion for Leave to File a Supplemental Brief is GRANTED.

2. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $57,000 in response to Interrogatory One as to damages and otherwise DENIED.

3. The Motion of defendants for a New Trial is GRANTED as to damages only.

4. A pre-trial/status conference will be held on July 17, 1981 at 1:00 p.m. to consider preparation of a case stated on liability and any other further proceedings, including a special listing for trial, provided the Court of Appeals does not grant the pending motion to revoke the limited remand.

BY THE COURT:

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	No. 74-122

ORDER

AND NOW, this 15th day of July, 1981, upon Order of the Court of Appeals for the Third Circuit entered July 8, 1981, it is ORDERED that:

The judgment in the sum of $5,445,000 entered August 22, 1979 in favor of Columbia Metal Culvert Company, Inc. and against Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. is hereby VACATED.

BY THE COURT:

/s/ Norma L. Shapiro
J.

bcc: Robert L. Price, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINIUM & CHEMICAL CORP. AND KAISER ALUMINIUM & CHEMICAL SALES, INC.	:	NO. 74-122

PLAINTIFFS' PRE-TRIAL STATEMENT RE: DAMAGES
DATED: SEPTEMBER 8, 1981

* * *

C. *Damages—Concept*

The concept behind Plaintiffs' damages evidence has been to estimate, from data available, and drawing conclusions from the data, the profits Columbia would have made without Kaiser's illegal acts, from June 1, 1973 through May 31, 1977; and to then calculate the value the business would have had as a going concern without Kaiser's illegal acts, as of May 31, 1977, deducting the amount received for the tangible assets. This is the same theory of damage which the Court held proper in its opinion dated June 17, 1981.

* * *

G. *Time Period For The Computation of Damages*

The basic analysis is to estimate what Columbia lost as a result of Kaiser's illegal actions. The beginning of the damage period has been described in the testimony as June 1, 1973, the beginning of Columbia's fiscal year. (N.T. 3865-66) The damages in this case are the profits Columbia lost up to May 31, 1977, (N.T. 3858), and then how much the value of Columbia as a going concern had been diminished as a consequence of Kaiser's illegal actions, as of May 31, 1977.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA CLISBY,	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
November 30, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.

APPEARANCES:

DUANE, MORRIS & HECKSCHER
BY: MICHAEL M. BAYLSON, ESQ.,
for Plaintiffs.

BLANK, ROME, COMISKY & McCAULEY
BY: RICHARD P. McELROY, ESQ., and
ALEXANDER D. BONO, ESQ.,
for Defendants.

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* * *

MR. BAYLSON: Your Honor, I just think it would be very unfair to divide these into two time periods. There is no testimony. Mr. Draper said that they couldn't have continued in business past '75, but he said specifically he wasn't asked to calculate damages. He was only doing a calculation of what lost profits would have been. Then Dr. DiPodwin came in and said this was a proper period.

THE COURT: Let me ask you, I am not trying to resolve it now because I have to see these people and give you a choice whether you want to come in early tomorrow morning or talk to me later this evening. I am willing to com ein early tomorrow morning if you would prefer or stay, but I have an awful lot of lawyers waiting that I would like to see. The concern that I have is maybe dealt with—you are talking about not dividing years in any of these questions.

MR. BAYLSON: Right.

THE COURT: Is to be able to mold the verdict to avoid duplication. That is my concern, and it does seem to me, and maybe I could do it by instructing the jury, but if they find that the business should have closed in '75, for example, and they award the damages as a going concern in '75 it seems to me, Mr. McElroy, without agreeing you can there was evidence from which they could find the value as a going concern in '75.

MR. McELROY: Well, I don't know that there is.

MR. BAYLSON: Your Honor, another reason this is very unfair. We had all these pretrial statements, experts who computed damages on the same four-year fiscal period. Dr. DiPodwin. It is very unfair after the evidence comes in that they propose interrogatories dividing it.

THE COURT: All right. You're ahead of the game right now. You are persuasive.

MR. BAYLSON: I will stop.

THE COURT: Let me make my point. I will tell you that Mr. McElroy's way of putting it has a surface appeal to me, and bearing in mind how unfair you consider it I have given some thought that in itself it is not entirely persuasive. I assume what one of your proposes the other will object to, but what I have to

do is avoid duplication of damages. Now, if the jury buys Mr. McElroy's argument that they should have closed in '75 and gives a going concern value as of '75 there would be duplication if they also found lost profits from '75 to '77, and actual losses. When do the actual losses stop?

MR. BAYLSON: The actual losses are up to '77 too.

MR. McELROY: They never did.

THE COURT: In other words, it is clear to me that you are entitled to loss of profits projected until the time the plaintiff goes out of business, but when the plant goes out of business you are entitled to its going concern then. You are not entitled to both loss of profits and going concern value for the same period.

MR. BAYLSON: I agree.

THE COURT: We are all agreed on that. So, the question for me is how do I convey that concept to the jury. Your answer is easy. You say don't let them con..der that the business should have closed before '77.

MR. BAYLSON: No, that is not.

THE COURT: If it should have closed before '77 then I have to tell them that because of loss of profits, actual losses, you determined the going concern value at an earlier time.

MR. BAYLSON: If your Honor gives some instructions on the loss that are proper which I am sure you will, then they are going to find accordingly.

MR. McELROY: But they are going to be looking at an interrogatory that says '74 to '77. That's the problem.

THE COURT: What I did was just eliminate the date.

MR. McELROY: That might do it.

THE COURT: And say as of the time that you determine.

MR. McELROY: Yes. It isn't a question in my mind of when they should have gone out of business. The is when they did go out of business, May 31, 1975. You measure at the termination of the business, that is May 31, 1975. All adding those two years does is add approximately $500,000 to $600,000 worth of losses by keeping the doors open.

THE COURT: Is it your point that the value of the business in 1975 was the same as its value in '77, was the same as a going concern?

MR. McELROY: No, I would presume it is less because the project profits were less.

MR. BAYLSON: No, I am not sure. It may be more.

THE COURT: Because they haven't suffered all the losses. The actual value. If that business had been sold to Howmet in '75 instead of '77 based not on projected losses or what would have happened but what actually did happen could a jury—it isn't what we think. Could a jury reasonably find it could have had a higher value.

MR. BAYLSON: Sure, because its operating history before that would have been better. I think the damages projections were higher. The major point is it is confusing the jury because in the context of all the pretrial statements and what Dr. DePodwin himself said now they are being asked to divide this four-year period in half, and it is going to make me look stupid or the plaintiffs look stupid. We are talking about four years and the charge says we have to divide it in half.

THE COURT: You would have had subtotals on your charts.

MR. BAYLSON: At the minimum, and have Dr. DePodwin make computations. They made their statements on the four-year period and their experts give predictions on the four-year period, and my experts, and then come in and ask for interrogatories dividing it in half. It is confusing and an unfair state of affairs.

MR. McELROY: I don't know of anything that requires the defendant to agree with his damage period. And I don't.

THE COURT: No, but the interrogatories have to fairly address the issues at trial, and what I have been trying to do is to get these interrogatories in such a form that I could mold the verdict, but I can't allow my efforts to do that to get so specific that makes the trial unfair.

MR. McELROY: If your Honor feels that Mr. Baylson makes a point that now having two sets of questions as to two different periods of time is unfair I think it is actually unfair to us to say that there is one period '74 to '77 and maybe some balance can be struck by eliminating the dates.

THE COURT: That's what I am thinking of doing exactly.

MR. McELROY: And we are free to argue whatever we want to.

THE COURT: Yes, and they are. Now, is it your pleasure to come back later tonight or early tomorrow morning?

Off the record.

(Discussion off the record.)

(Concluded in Chambers.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
December 1, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.
(and a jury of eight)

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* * *

First, plaintiffs are seeking the actual losses that Columbia incurred while it was still doing business.

Second, the plaintiffs are seeking lost profits that they project Columbia would have made from the sale of culvert pipe if the antitrust laws had not been violated.

* * *

With regard to the actual losses Columbia is claiming profits lost during its fiscal years 1974 through 1977 in this category. I am referring here to losses actually and reasonably sustained as a result of Kaiser's violation of the antitrust laws.

* * *

You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are

caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.

Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum shortage, a lack of price protection for long-term requirement contracts.

* * *

Columbia's damage computations are based on the contention that Columbia suffered injury until the close of its 1977 fiscal, May 31, 1977.

Kaiser contends that Columbia was in effect out of business by 1975 and should have been terminated by then, indeed called attention to the fact that this lawsuit began in 1974 and contends that the actual losses after that date would not have been reasonably suffered, and that Columbia's projected loss of profits thereafter are not valid. So, it contends that the value of the loss of the business as a going concern, if any, should properly be determined as of that date in 1975.

Columbia contends that its business was effectively terminated in June 1977 when it would have been forced to cease operations and close its doors but for the government loan it received.

If you find this is reasonable based on the evidence you may award an amount based on loss of profits until May 31, 1977 and value of the business as a going concern as of that date, but if you find that the plaintiffs failed to close down or liquidate Columbia when it was reasonable to do so under the circumstances shown by the evidence then you should reduce the amount of their damages by the amount that you believe was sustained after the point in time when Columbia should have closed down. For example, if you find it was not reasonable for Columbia to have continued in business and to have sustained losses after a certain date then you can't award damage for lost profits beyond then.

Likewise if you find that it was unreasonable for Columbia to continue in business beyond a certain date and you award

damages for the loss of value, the going concern value of the business, you should calculate that going concern value as of the date you believe it was reasonable for Columbia to have ceased operations.

The important thing is that you make every effort and you do not duplicate the damages under each of these various elements the plaintiff is entitled if you feel that the plaintiff met its burden as to each of these elements but not to a duplication. Each one of them once.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

Philadelphia, Pennsylvania
December 2, 1981

BEFORE: HONORABLE NORMA L. SHAPIRO, J.
(and a jury of eight)

APPEARANCES:

DUANE, MORRIS & HECKSCHER
BY: MICHAEL M. BAYLSON, ESQ.,
for Plaintiffs.

BLANK, ROME, COMISKY & McCAULEY
BY: RICHARD P. McELROY, ESQ., and
ALEXANDER D. BONO, ESQ.,
for Defendants.

(In court 9:30 a.m.)

THE COURT: Good morning.

Off the record.

(Discussion off the record.)

THE COURT: Will you bring the jury in, please.

(Jury present 9:41 a.m.)

THE COURT: Good morning. This is the kind of morning when you don't mind being here inside, and if your deliberations should continue during the day the government will provide you with lunch, and your order will be taken in mid-morning so that it can come to you on time.

I told you yesterday when you left that you must not discuss this matter with your family or friends, and because you are a deliberating jury and it was so important that when you returned this morning I would ask each of you whether you have refrained from reading about this in the newspapers listening to anything about it on the radio, learning anything about the case on television, and whether you have also refrained from discussing it with your family and friends in accordance with my instructions. Rather than repeat that question to each of you you will understand that this same question is addressed to each of you, and I will ask for your individual responses.

Mr. Davidson, have you followed the instructions of the Court? Have you refrained from discussing this with your family and your friends.

JUROR NO. 1: No.

THE COURT: No you have not refrained, or no you have not discussed it?

JUROR NO. 1: I have not.

THE COURT: Discussed it.

JUROR NO. 1: That's right.

THE COURT: And you haven't learned anything about it outside the courtroom on the radio or T.V. have you?

JUROR NO. 1: Right.

THE COURT: Mr. Masanti, have you refrained from discussing this matter with your family and friends?

JUROR NO. 2: Yes.

THE COURT: Have you learned anything about it outside the courtroom?

JUROR NO. 2: No.

THE COURT: Mr. Napp, have you discussed this with your family or friends or anyone else than the jurors in the jury room?

JUROR NO. 3: No, I have not.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 3: No.

THE COURT: Mr. Thourson, have you refrained from discussing this with anyone?

JUROR NO. 4: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 4: No.

THE COURT: Ms. McPharlan, have you followed the instructions of the Court and refrained from discussing it?

JUROR NO. 5: I did, your Honor.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 5: No.

THE COURT: Mr. Majasky, have you refrained from discussing the matter?

JUROR NO. 6: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 6: No.

THE COURT: Mr. Woodington, have you refrained from discussing this with anyone since you left here yesterday?

JUROR NO. 7: Yes, I have.

THE COURT: Have you heard anything about it outside the courtroom?

JUROR NO. 7: No, ma'am, I have not.

THE COURT: Ms. Fitz, have you refrained from discussing with persons other than the jurors and not discussed it since you left yesterday?

JUROR NO. 8: Yes.

THE COURT: Have you heard anything about the matter outside the courtroom?

JUROR NO. 8: No.

THE COURT: Thank you. With that I will send you back to the jury room to resume your deliberations, and my deputy, Ms. Starr, will continue to be your contact if there is any problem. Thank you. Good morning.

(Jury out to resume deliberations 9:46 a.m.)

(In court 2:23 p.m.)

THE COURT: Will you bring in the jury, please.

(Jury present 2:24 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. Who is the foreperson that you have selected.

JUROR NO. 7: I am, your Honor.

THE COURT: All right.

Ladies and gentlemen, I have been advised that you have reached a verdict. Is that correct?

(General affirmative response by the jurors.)

THE COURT: Now I will ask the foreperson to answer the questions that I address to you, and I ask you to listen carefully because at the conclusion of his responses I will then ask each of you if that is also the verdict of each of you as to each and every question that is asked.

Mr. Woodington, in what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?

JUROR NO. 7: $728,000.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?

JUROR NO. 7: $742,520.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to

Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?

JUROR NO. 7: $80,000.

THE COURT: In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?

JUROR NO. 7: $1,638,793.

THE COURT: Thank you.

Ladies and gentlemen, you have heard the verdict and I will ask each of you if that is your response to each question as well.

Mr. Davidson.

JUROR NO. 1: Yes, it is.

THE COURT: On all the questions?

JUROR NO. 1: What was that?

THE COURT: Was that the verdict of yours as well as the jury? Do you agree that is what you decide?

JUROR NO. 1: Yes.

THE COURT: As to each question?

JUROR NO. 1: No.

THE COURT: Which question was not your answer?

JUROR NO. 1: I didn't get you.

THE COURT: Was that your answer to question 1?

JUROR NO. 1: Oh, yes.

THE COURT: Was that your answer to question 2?

JUROR NO. 1: Yes.

THE COURT: Was that your answer to question 3?

JUROR NO. 1: Yes, ma'am.

THE COURT: And was that your answer to question 4?

JUROR NO. 1: Yes, ma'am.

THE COURT: Mr. Masanti, was that your response to all the questions?

JUROR NO. 2: Yes.

THE COURT: Mr. Napp, was that your answer to all the questions?

JUROR NO. 3: Yes, it was, your Honor.

THE COURT: Mr. Thourson, was that your answer to all the questions?

JUROR NO. 4: That's right.

THE COURT: Ms. McPharlan, was that your answer to all the questions?

JUROR NO. 5: Yes.

THE COURT: Mr. Majasky, was that your answer?

JUROR NO. 6: Yes, your Honor.

THE COURT: Mr. Woodington, was that your answer as well as the jury's?

JUROR NO. 7: Yes.

THE COURT: And Ms. Fitz, was that your answer?

JUROR NO. 8: Definitely, your Honor.

THE COURT: Thank you very much, and I want to thank you for the time and effort that you have spent in addressing yourselves to the issues and to the evidence presented which was sometimes technical and not always easy to understand, and with that I want to excuse you and wish you a good day. Your service as jurors has been concluded, but you are entitled to a certificate of thanks for your service and they will tell you down in the jury office how you obtain that and any further instructions that you have to get.

Thank you and good afternoon.

You may not keep your notes. You will leave them with my deputy, please, and leave the original verdict form, please.

(Jury excused.)

MR. BAYLSON: Your Honor, I would ask that the verdict be recorded and judgment entered trebled the amount of the verdict.

THE COURT: The verdict will be recorded as it was in the presence of the jurors, and I will enter the judgment later. I have to do the arithmetic. I will issue an order today requiring post trial motions within ten days, and as we agreed yesterday that within 14 days of the filing of the post trial motions the moving party will serve and file a memorandum of law in support of the post trial motion or motions. A memorandum of law in opposition must be served and filed within ten days thereafter. I will hold oral argument on Friday, January 29 at 9:00 o'clock.

Thank you. That concludes the proceedings in this case. Thank you all very much.

MR. McELROY: No, it doesn't.

THE COURT: That concludes them for the time being. We will recess.

(Concluded at 2:30 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia?	None ___	$ 728,000
2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe?	None ___	$ 742,520
3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet?	None ___	$ 80,000
4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business?	None ___	$1,638,793

/s/ _____
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL
WHEN DELIBERATIONS HAVE BEEN COMPLETED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISKY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

CIVIL JUDGMENT

Before Honorable Norma L. Shapiro

AND NOW, this 2nd day of December 1981, in accordance with the Jury's answers to interrogatories and the direction of the Court that the verdict be trebled according to law.

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc. and against the Defendants Kaiser Aluminum and Chem. Corp. & Kaiser Aluminum & Chem. Sales, Inc. in the sum of NINE MILLION, FIVE HUNDRED SIXTY-SEVEN THOUSAND, NINE HUNDRED AND THIRTY-NINE ($9,567,939.00) DOLLARS.

BY THE COURT: Norma L. Shapiro

ATTEST: Norma L. Shapiro, J.

Civ 1 (8/80)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. JANUARY 17, 1983

INTRODUCTION

Before the court are post-trial motions arising out of a retrial on damages only in this antitrust litigation. Following the entry of judgment for plaintiffs on the jury's answers to four special interrogatories in the trebled amount of $9,567,939, defendants Kaiser Aluminum & Chemical Corp. ("KACC") and Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial on both liability and damages.

Plaintiff Columbia Metal Culvert Co., Inc. ("Columbia"), a liquidated corporation (interest in this litigation has been assigned to the present plaintiffs, its former shareholders), originally brought an action against KACC and KACSI, former Columbia salesman Robert A. Kennedy and his company, Kennedy Culvert and Supply, in which it alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. §14. A detailed description of the specific actions complained of and the procedural history of this case is contained in the Memorandum

accompanying the Order of June 17, 1981 published at 518 F. Supp. 102 (E.D.Pa. 1981).

At the first trial before The Hon. Edward N. Cahn, judgment in favor of defendants was entered on defendants' motion for a directed verdict at the close of Columbia's evidence on the grounds that Columbia, formerly a manufacturer and distributor of aluminum culvert pipe, had not established a *prima facie* case of conspiracy in restraint of trade between KACC and KACSI or between either and Kennedy, proved that Kaiser had monopoly power in the relevant product market, or established a *prima facie* violation of Section 3 of the Clayton Act. The Third Circuit affirmed the grant of a directed verdict as to Kennedy but reversed as to KACC and KACSI, except on the Clayton Act count. Sufficient evidence was presented to allow a jury to decide the relevant product market, whether KACC/KACSI had monopolized or attempted to monopolize that market, and whether KACC and KACSI conspired in violation of Sections 1 and 2 of the Sherman Act.

On remand and transfer to the docket of this court, there was a bifurcated trial by jury. The jury found on answers to special interrogatories that the relevant product market was aluminum culvert and draingage pipe, that KACC and KACSI had monopolized and attempted to monopolize the relevant product market, that KACC and KACSI had conspired in violation of Sections 1 and 2 of the Sherman Act, and that Columbia had been injured by the unlawful acts of KACC and KACSI. Damages awarded in the amount of $1,815,000 were trebled and judgment entered in favor of plaintiffs for $5,445,000. Following a direct appeal (because defendants post-trial motions were untimely filed), the case was remanded to this court by the Court of Appeals for disposition of Kaiser's motions for a judgment notwithstanding the veredict or in the alternative for a new trial.

We denied Kaiser's motions for judgment notwithstanding the verdict or a new trial as to liability because the evidence at retrial was not substantially different from that previously held adequate by the Court of Appeals; the jury's determination was not so against the weight of the evidence as to shock the

conscience of the court. 518 F. Supp. at 102. However, judgment notwithstanding the verdict was granted as to the first interrogatory on damages (awarding defendants $57,000 for Columbia's increased usage of aluminum coil in 1971-73). *Id.* at 114. A new trial was granted on the second and third interrogatories, awarding $1,048,000 in losts profits from 1973 to May 31, 1977 and $710,000 for loss of going concern value thereafter.

Plaintiffs had presented only two damages witnesses, plaintiff Bonjorno himself and an expert, Dr. Alfred Kuehn. The record was found insufficient to establish the requisite factual basis to allow the jury to make a rational determination of the accuracy of Bonjorno's testimony. *Id.* at 115. Dr. Kuehn's testimony was found confused and confusing. "The total effect is that of a witness who did not know what he was talking about; therefore, the jury could only rely upon charts and figures, the factual basis for which had not been adequately established or explained." *Id.* at 118. In sum, plaintiffs' evidence created a speculative verdict on damages. *Id.* at 117. Because the damages and liability issues were not inextricably interwoven, and there was no indication that the jury verdict was the result of compromise on the liability and damage questions, retrial on damages only was ordered. *Id.* at 119.

The parties were requested to state their positions on procedure for a fair retrial on damages. Defendants had conceded at the argument on post-trial motions following the first trial that the court had the power to retry on damages only, but after the new trial on damages was granted, defendants argued that it would violate their constitutional right to trial by jury. However, counsel for defendants actively participated in discussions on the damage trial procedure.

At the outset of the damage trial, the court informed the jury of their duties. Because a jury in an antitrust matter must award only those damages that flow from the antitrust injury, *see,* 518 F. Supp. at 109, the opening statement was designed to acquaint the jurors with the nature of the antitrust violations that had been found. The jurors were told the parties, the businesses they were or are engaged in, the product and geographic markets involved, the antitrust laws the prior jury had found

violated, the purpose of those laws, and the types of liability evidence presented at the prior trial. Finally, the liability interrogatories and answers of the prior jury (518 F. Supp. at 119, App. A) were read to the damage jury. (N.T. 20-25).

Upon the conclusion of this opening statement, counsel for plaintiffs made opening remarks not only on the evidence to be presented by plaintiffs during the retrial but also the liability evidence that had been presented during the prior trial. To provide the jury with an understanding of the activities that gave rise to liability, plaintiffs' counsel was permitted to list the types of activities by KACC and KACSI relied on by plaintiff to establish liability at the first trial: that defendants refused to sell raw materials to Columbia; located a new culvert manufacturing plant within forty miles of Columbia's plant to retaliate against Columbia for buying materials from another supplier; set up Kennedy, the former Columbia salesman, to compete with Columbia; instituted a "price squeeze," in which Kaiser raised the price of the aluminum needed to fabricate culvert but sold fabricated culvert at a constant price; and induced Columbia to buy a machine suitable for use only with Kaiser products unless modified at significant expense. (N.T. 32-41). Counsel for defendants responded to plaintiffs' statement on liability in his opening remarks. (N.T. 53-56).

The jury, answering four special interrogatories on damages (attached hereto as Appendix A), awarded plaintiffs $728,000 for actual losses, $742,520 for lost profits on the sale of aluminum culvert pipe, $80,000 for lost profits on the sale of flat corrugated aluminum sheet, and $1,638,793 for the diminution in the value of the business. Judgment in the trebled amount of $9,567,939 was entered on this special verdict. Kaiser defendants have again filed post-trial motions. Judgment notwithstanding the verdict is sought on the grounds that: the retrial on damages was improper because the jury was unable to award damages flowing only from the antitrust injury; damages awarded for lost profits duplicated damages for actual losses (Int. 2); the profit projections were unsupported by evidence and artificially enhanced by plaintiffs' use of an improper geographic area and understatement of certain expenses; and the plaintiffs' contentions in the

trial on damages contradicted their contentions on the price squeeze in the trial on liability. Defendants also contest the period for which an award of damages on actual losses and lost profits was permitted. Defendants claim that damages awarded for lost profits from the intended sale of flat corrugated sheet (Int. 3) were speculative. Defendants claim also that allowing damages for loss of the value of a going concern (Int. 4) was improper because Columbia did not prove it ever actually terminated business during the damage period. Defendants contend that in any event the damage for loss of going concern value was overstated and was based on assumptions not supported by the evidence.

Defendants move in the alternative for a new trial on the grounds that the retrial on damages only was improper and prejudicial; the conduct of plaintiff's counsel was inflammatory; the court erred in its evidentiary rulings, charge and form of special verdict; and finally that the amount of the verdict was grossly excessive, shocking to the conscience, and the product of jury bias against defendants. Defendants' alternative motion for a new trial on damages only is denied. Defendants' motion for judgment notwithstanding the verdict is denied with regard to damages awarded in response to Interrogatories 1, 2 and 3 and granted as to damages awarded in response to Interrogatory 4. As a result, the jury's award is reduced by $1,638,793 (Int. 4) and the award remaining is in the total amount of $1,550,520. Therefore, when trebled, plaintiffs are entitled to entry of judgment in the amount of $4,651,560.

RETRIAL ON DAMAGES ONLY

KACC and KACSI (hereinafter referred to collectively as "Kaiser") object to the retrial on damages only ordered by the court on June 13, 1981 upon granting in part its motion for new trial. Kaiser contends that becuase it did not hear the evidence on liability, the damage jury was unable to determine which, if any, of the losses that Columbia suffered were actually caused by the antitrust violation. That such causation was required is clear. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477,

489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type . . . that flows from that which makes defendants' acts unlawful . . .". However, the retrial procedure utilized did not in and of itself preclude rational jury determination of damages caused by the antitrust violations found by the previous jury.[1]

> The Third Circuit has expressly approved the use of a retrial on antitrust damages in *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); other cases in the Third Circuit are collected in plaintiffs' brief at Appendix C.[2] In that case the Court of Appeals found legal error in plaintiff's calculations of damages and remanded to the district court for a new trial on damages only. 531 F.2d at 107-09. We cannot presume that the Court of Appeals ordered a procedure that was *per se* violative of the rights of antitrust defendants. *Pueblo, supra* was decided after *Pitchford, supra*, but it was not the first case to hold that damages must be caused by defendant's antitrust violations and it may be assumed that the Court of Appeals was cognizant of a causation requirement when *Pitchford* was decided. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), for example, decided years before the remand for a damage trial in *Pitchford*, referred explicitly to the "necessary causal relation between the [violator's] conduct and the claimed damages. . . ." *Zenith, supra* at 125.

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1. In his opening statement, Kaiser's counsel "assured" the jury that Kaiser did not violate the antitrust laws or "any other law" notwithstanding the prior jury's determination of liability. (N.T. 52). Kaiser continues to object to the prior jury's determination of liability. Indeed, Kaiser seemed to protest the very mention of the previous liability verdict to the damage jury. (Defendants' Brief at 22). Of course, informing the damage jury of the prior determination of liability was a necessary first step in a retrial on damages to ensure that the damages, if any were found, flow from the antitrust violations. The court made strenuous, although not altogether successful, efforts to limit reference to the issues resolved at the liability phase to the bare minimum required for the jury to understand and determine the damage issues. (Defendants' Brief, 18-60; Plaintiffs' Brief, 26-54).

2. It has only recently been reported that the Court of Appeals for the Seventh Circuit has awarded a new trial on damages only in the MCI-AT&T antitrust litigation. *Philadelphia Inquirer*, January 13, 1983.

Defendants never requested that special interrogatories as to the alleged anticompetitive acts complained of by plaintiffs be submitted to the liability jury. (Defendants' Brief at 14-15, 23-24). Kaiser claims that the damage jury could not know which of the five alleged anticompetitive practices complained of by plaintiffs were actually relied upon by the jury that found it liable. But plaintiffs' economist did not attempt to and did not have to distinguish between actual losses caused by the various types of anticompetitive practices. Whether plaintiffs' losses were caused by one or more of the anticompetitive acts was immaterial on the damages issue so long as the jury was presented with competent evidence to prove the extent of plaintiffs' losses caused by Kaiser's impairment of the free and open market in aluminum culvert pipe. Plaintiffs' evidence was so directed. (*See, e.g.*, N.T. 509, 542, 548, 596). The charge to the jury made clear that the jury could only award damages for injury caused by Kaiser's conduct in the market:

> You are not to presume just because Columbia suffered financial losses or went out of business that all such losses are caused by Kaiser. The plaintiff, as I said, must prove those financial losses are setbacks that were caused by Kaiser and establish some reasonable basis in the evidence for the damages that you find.
>
> Similarly it follows from that that you should not award plaintiffs damages for losses caused not by Kaiser but by conditions in the economy in general or a recession in the construction industry, aluminum, shortage, a lack of price protection for long-term requirement contracts.
>
> You may also consider whether or not plaintiffs' calculations should have taken into account poor business judgment or poor management. Some corporations suffer losses solely because of their own inadequate financial capitalization. You can't award plaintiffs damages for all its losses if you find that Columbia was under capitalized, that is that there was a lack of sufficient working capital and that losses were suffered as a result of that, because under such

circumstances Columbia's financial inadequacies rather than Kaiser's conduct would have caused some portion of the losses.

(N.T. 1531-32).

Even if there were a serious question raised as to the propriety of a new trial on damages only, defendants waived objection to this procedure. Before issuing the June 17, 1981 Order granting the retrial, defendants spoke in favor of the concept. Addressing the court's question during supplemental oral argument on the post-trial motions on December 29, 1980, counsel for Kaiser stated:

> . . . with respect to the grant of a new trial with respect to damages alone, obviously, in our submission, the cases would support that kind of remedy.
>
> As to the mechanics upon the new trial, it seems to me, Your Honor, that there would, of necessity, simply be more to the trial than a review of the charts, testimony of Dr. Kuehn, or whomever the plaintiff wished to put on as a fact witness or expert witness. It seems to me there are additional matters relevant to damages and the amount of damages which also go to questions of causation. Those as we have addressed in our post-trial briefs, deal with conditions in the marketplace that may have impacted upon Columbia's volume of sales, and hence on the amount of profit that it would have earned even assuming the existence of violations of the antitrust laws by Kaiser which also impacted upon Columbia . . . .
>
> With respect to liability, I believe that it would be sufficient to inform the jury that a verdict on liability has been established; that a jury has found that that violation of the antitrust laws caused some damage to Columbia, and it would be up to the jury to determine what the extent and amount of that damage was, and I believe that a trial could occur.

Docket Entry No. 510, N.T. 406. Defendants, having supported a new trial on damages before the jury's award at such trial was

known, should not be permitted to object to the procedure itself just because its outcome is not to their liking.

But even if defendants are correct that a limited retrial on the issue of the amount of damages was so prejudicial to Kaiser as to constitute reversible error, the remedy can certainly not be a judgment notwithstanding the verdict in favor of defendants; at most defendants are entitled to a retrial on both liability and damages. That remedy does not lie with this court at this time. Following a bifurcated trial on liability and damages on remand from the Court of Appeals, this court denied a motion for a judgment notwithstanding the verdict on liability; judgment notwithstanding the verdict was granted as to one item of damage in the amount of $157,000 and a new trial granted as to the award of damages for lost profits ($1,048,000) and destruction of Columbia as a going concern ($710,000). But, that new trial was as to damages only for the reasons stated in the court's Opinion of June 18, 1981. At this juncture, the power of this court is limited to granting a new trial again on damages only. This was called to the attention of counsel frequently in the course of the trial in trying to assure fair procedures and prevent yet another retrial. (N.T. 97-99; 976-978). Therefore, the court concludes that defendants' objections to a limited retrial on damages are only to preserve them for the Court of Appeals which, of course, has the power to order a new trial on liability and/or damages.

JUDGMENT NOTWITHSTANDING THE VERDICT

The standard in this Circuit for the entry of judgment notwithstanding the verdict is clear. The court must interpret the evidence in the light most favorable to the verdict winner, and may grant the motion only if that evidence and the reasonable inferences to be drawn therefrom fail to support the verdict as a matter of law. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 (3d Cir.), *cert. denied*, 400 U.S. 826 (1970). *See also, Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1098-99 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Kademenos v. Equitable Life Assurance Society*, 513

F.2d 1073, 1974 (3d Cir. 1975); 6A *Moore's Federal Practice* §59.08[5] at 59-152 (1979). A directed verdict may be entered on only one or a combination of jury findings if a special verdict has been returned in accordance with Fed.R.Civ.P. 49(a). *See, Franklin Music Co. v. American Broadcasting Cos., Inc., et al,* 616 F.2d 528 (3d Cir. 1979); *Fox v. Kane-Miller Corp.,* 398 F. Supp. 609, 649 (D.Md. 1975), *aff'd,* 542 F.2d 915 (4th Cir. 1976).

Defendants concede this standard but contend that the court should enter judgment n.o.v. because the verdict is contrary to the evidence and unsupported in the record; that is, there is but one reasonable conclusion as to the proper judgment. Defendants agrue this persuasively and well. Defendants' brief makes an excellent closing speech to the jury; the problem is that the jury heard it and nonetheless decided for plaintiffs. With the exception of damages for loss of value of a going concern discussed below, there is no error of law during the trial or in the court's charge to the jury on damages (N.T. 554) that would justify setting aside that verdict. The charge was fair and clear although relatively brief because it commented little on the evidence argued in detail by able counsel for both sides. But it touched on and left to the jury all but one of the matters of which defendants now complain in asserting a right to judgment notwithstanding the verdict.

The Supreme Court stated in *Zenith, supra:*

> Trial and appellate courts alike must also observe the practical limits of the burden of proof, which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

395 U.S. at 123. Accordingly, in an antitrust case, damages need not be proven with exactness or precision; rather, "the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 264 (1946). The court does not have the prerogative of drawing

inferences from facts within the exclusive province of the jury that are contrary to its findings without usurping the functions of the jury as a fact finding body. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 566 (1931). It was for the jury to determine the weight of the evidence and the credit to be given the witnesses, expert or otherwise; it has given its verdict accordingly. To set this verdict aside except for clear error of law would impermissibly intrude on the role of the jury in an antitrust trial.

DUPLICATION OF ACTUAL LOSSES AND LOST PROFITS

Kaiser contends that the award for hypothetical lost profits (Int. 2) duplicates the award for actual losses (Int. 1). Kaiser argues that these two types of losses are "irreconcilably contradictory and mutually exclusive." (Defendants' Brief at 64). *See, William Goldman Theatres, Inc. v. Loew's, Inc.,* 69 F. Supp. 103, 105 (E.D.Pa. 1946) *aff'd,* 164 F.2d 1021 (3d Cir.), *cert. denied,* 334 U.S. 811 (1948). In *William Goldman Theatres,* the plaintiff was unable to obtain first-run movies for his leased theater because of defendants' conspiracy to restrain trade. 150 F.2d 738, 742 (3d Cir. 1945). The district court declined to award out-of-pocket expenses actually incurred by plaintiff in connection with an alternative use of the premises in addition to the lost profits from the hypothetical operation of the business from which plaintiff was excluded by defendant's conduct. 69 F. Supp. at 105. Plaintiff's actual losses from the ineffective effort to mitigate damages were not causally connected with the losses from the intended use for which antitrust damages were awarded. *See,* 69 F. Supp. at 105.

However, Columbia was in business throughout the damage period as a culvert fabricator and distributor. To the extent it would have made profits in a free and open market, the antitrust laws provide compensation. Columbia incurred actual losses while running the business it contended it would have operated profitably but for the illegal conduct of the defendants. Plaintiffs' damages would have been reduced had Columbia

actually made a profit during the damages period, and so plaintiffs may recover the net losses that were actually incurred in addition to the profits they would have made. Had Columbia made a profit, that sum would have been subtracted from hypothetical lost profits to arrive at the true measure of harm to Columbia. *Pitchford, supra* at 109. But plaintiffs suffered a loss rather than a profit and are entitled to subtract this negative figure from the hypothetical lost profits proved. *(See,* N.T. 55-56). The resulting calculation, the addition of actual losses to lost profits, is necessary to make plaintiffs whole.

LOST PROFITS ON ALUMINUM CULVERT PIPE

Plaintiffs utilized a market share theory to calculate their hypothetical lost profits during the damage period. Plaintiffs' expert economist, Dr. Gary Bowman, calculated the amount of aluminum culvert pipe actually sold in the relevant market and then calculated the proportion of sales Columbia would have made absent an antitrust violation. He sought to establish the number of pounds of culvert Columbia would have sold in a free and open market and multiplied that number by the estimated revenues Columbia would have received per pound. From this estimate of gross revenues he subtracted his estimate of Columbia's total expenses if there had been a free and open market. This type of analysis is proper in a case in which plaintiffs were deprived from competing freely in a particular product and geographic market, and the injured party need not produce the "kind of concrete, detailed proof of injury which is available in other contexts." *Zenith, supra* at 116, 123-35.

An expert opinion on relevant damages issues is not enought to satisfy the plaintiffs' burden on damages unless that opinion is based on relevant data and the assumptions behind the opinion are shown to be realistic so that the jury has a rational basis for its decision. *In re IBM Peripheral EDP Devices Antitrust Litigation,* 481 F. Supp. 965, 1012, 1020 (N.D.Calif. 1979). Plaintiffs presented expert testimony on all elements of the market share theory, their estimates of the size of the local market issue, Columbia's share of the local and non-local

markets assuming free and open competition, and Columbia's expenses in a free and open market; therefore, the record did not force the jury to engage in impermissible speculation.

Defendants argue that the jury's award of plaintiffs' claims for lost profits must be set aside because plaintiffs' projection of lost profits on the sale of aluminum culvert pipe is based upon assumptions unsupported and contradicted by the evidence in that:

a. the volume of sales in the so-called "local area" are deliberately overstated, contrary to the evidence in the record;

b. plaintiffs' proof on damages improperly deviated from the stipulated relevant geographic market; and

c. plaintiffs' projections of profits on the sale of aluminum culvert pipe were artifically and improperly enhanced by understating certain expenses.

The first step in estimating what a defunct business would have sold in a free and open market was to estimate the overall volume of the market. Plaintiffs' expert chose to use two geographic markets: local and non-local. The local, or "Vineland," selling market was the area covered by the approximately 150-mile radius surrounding Vineland, New Jersey, the location of Columbia's plant. The non-local market was the remainder of the geographic market for which plaintiffs seek damages. Plaintiff's stated rationale for using two markets was that Columbia would have commanded a significantly greater proportion of sales in the local rather than non-local area—50% rather than 30%.

Thus, if plaintiffs' estimate of the number of pounds sold in the local market was too high because it took into account pounds that were sold in the non-local market, the figure for the total number of pounds of pipe sold by Columbia would be inflated, since the local poundage is multiplied by .5 but the non-local by .3. It is plaintiffs' burden to put into evidence a reasonable and rational estimate of the size of the market. *Schwabe, Inc. v. United Shoe Machinery Corp.,* 297 F.2d 906,

911-12 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). Where conflicts as to credibility exist as to ceratin estimates, they are to be resolved by the jury.

Defendant points out that Dr. Bowman used figures for the so-called "local market" that included non-local sales although Dr. Bowman asserted to the contrary. (N.T. 609). Under cross-examination, Dr. Bowman stated that he obtained his estimate of local market sales by adding sales from Kaiser's New Castle, Delaware plant to Columbia's Vineland sales, This approximately 150-mile local sales area included all of New Jersey, Delaware, most of Maryland, approximately the eastern third of Pennsylvania and very small portions of Virginia, West Virginia, and New York. Ex. D-150 (Map of Eastern United States with 150-mile radius of Vineland delineated). Kaiser introduced uncontradicted deposition testimony that New Castle sales include sales from the entire state of "Virginia, West Virginia, Maryland, Delaware, New Jersey, Pennsylvania." (N.T. 886), Dr. Bowman used an "adjusted territory pounds" figure and then assumed that included only sales within the local area (N.T. 610); Kaiser argues the invalidity of that assumption. Kaiser's evidence tends to establish that significant sales were made outside the local area that Dr. Bowman considered the local market; Dr. Bowman admitted that if such were the case, his figures would have to be adjusted. (N.T. 611). Kaiser argues that because the jury had no basis upon which to adjust Dr. Bowman's inflated figures, Dr. Bowman's opinion on the total pounds of culvert sold by Columbia permitted the jury to speculate as to the total size of the market.

But Dr. Bowman told the jury he divided the entire market into two shares basically for two reasons: Columbia would have made more sales in an area closer to its plant, and Kaiser data from its New Castle and Schenectady plants was available. The local market focused on Kaiser sales areas and was not strictly speaking an area within a 150-mile radius of Vineland, New Jersey as defendants contended. Since Kaiser was the dominant selling force in the total market, Kaiser sold most of the aluminum culvert pipe, and the Kaiser data provided a natural factual basis for the computation of the market. On plaintiffs'

proof of its damages from Kaiser's violation of antitrust laws, Kaiser does not have standing to complain about its data not providing a precise "geographical fit" to the relevant geographical market in this case.

Q. Why did you pick those two areas? Why did you make that division?

A. Generally speaking the reason for making any division if you divide an overall market area into subareas you get a somewhat more accurate projection. That is the share of the market Columbia would have had in the near areas is bigger than it would have had in the further away area. The reason I chose those two areas is that that is the way Kaiser's statistics were broken down. It was convenient. They had figures for sales to what they called the New Castle area, and they had sales outside of that that I called sort of loosely the non-local area which also may be called the Schenectady area. Since I couldn't breakdown Kaiser's figures any other way and I had Mr. Bonjorno available to tell me how his sales broke down between the two areas as defined by Kaiser it was convenient to use those two breakdowns rather than a breakdown of the overall market into two submarkets.

Q. Once you had decided to make that breakdown, what was the first thing you then did with the data you had available?

A. Once I had the breakdown I wanted to see what kind of market share each of the companies would have had, specifically what market share Columbia would have had over the period '74 through '77.

Q. Did you attempt to determine what volume had actually been sold in each of those areas?

A. Yes, I did. I described that earlier. I'm sorry, that is clearly the first step. You have to know how much was sold in each of the areas over the period.

(N.T. 305-6, Dr. Bowman).

Plaintiffs contend that, even if their estimate of total pounds sold in the local market was inflated by overstatement of the size of the market, Kaiser could have introduced its own data demonstrating the size of the local market. (Plaintiffs' Brief at 69). Defendants chose instead to attack the credibility of plaintiffs' evidence at trial and its adequacy post trial. But once the jury has determined the credibility issues adversely to defendants only the issue of adequacy remains and the standard of proving damages is liberal. *Bigelow, supra.* That standard has been met if plaintiffs' expert is to be believed.

To determine the number of pounds of aluminum culvert pipe Columbia would have sold absent Kaiser's antitrust violations, Dr. Bowman multiplied the total poundage that would have been sold by all companies by his estimate of Columbia's share of the local and non-local markets. If that estimate had no basis in fact, the resulting calculation had no basis in fact and the jury in considering it would have been speculating in arriving at its verdict on lost profits.

Dr. Bowman determined that in a free and open market Columbia would have almost only Kaiser as a competitor and that Columbia would have obtained 50% of the sales in the local market and 30% of the sales beyond the local market.

> Q. Now, why did you select fifty per cent—well, for the three years '75, '76 and '77, why did you use that specific figure [for the local area]?
>
> A. Basically because there were two competitors in the marketplace. Basically was Kaiser and Columbia, and basically they were equally situated.
>
> It is true that Columbia was developing its position, but fundamentally regarded them as equally situated competitors, and I think they would have shared the market equally.

(Examination of Dr. Bowman, N.T. 507). The credibility of Dr. Bowman's analysis of the relative strengths of Columbia and Kaiser absent antitrust violations was a question for the jury.

However, Dr. Bowman was obliged to demonstrate that he took other potential competitors into account in concluding that a fully competitive aluminum culvert market would be a duopoly. Under cross-examination Dr. Bowman asserted that he took such other firms into account but considered their influence negligible.[3]

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3. After stating there were two "major" sellers, he was asked about a third company:

> Q. So there was a third company. Is it also known as Lane Metal Products?
>
> A. Yes, I had forgotten--
>
> Q. This is a company that is a subsidiary of Bethlehem Steel?
>
> A. Yes, I understand it is.
>
> Q. So you found a third company, Lane, in the local area, selling aluminum pipe in the local area?
>
> A. Yes, that's correct.
>
> * * * * * * *
>
> Q. Why didn't you take Lane into account when you were estimating 50 per cent in the local area?
>
> A. Because Lane was only a very small factor in that market, more negligible.
>
> Q. You mean in reality, they were a small factor? You tried to determine how many pounds they sold or something and you determined they didn't sell many pounds?
>
> A. No. They would have been a small factor. I was making projections of what Columbia would have done in free and open competition.
>
> Q. I am talking about Lane, not Columbia.
>
> A. I thought you were asking about Columbia's 50 per cent share of this sub-area, the local area, and that is what I was attempting to respond to.
>
> Q. What I am trying to determine is did you take into account whether Lane would have any market share in this local market?
>
> A. I took that into account, yes. I considered them as a possibility, certainly.

At the trial Kaiser vigorously attacked Dr. Bowman's assumption that Columbia could have had 50% of the sales in the local area and 30% of the non-local sales. Defendants' witnesses were allowed to testify about possible competitors of Columbia and the entry into the aluminum culvert market of steel culvert producers. Kaiser's expert contested Columbia's alleged share of the market and testified to the fallacies of Dr. Bowman's analyses. Problems in comparing Kaiser's calendar year figures and Columbia's fiscal year figures were also developed at length. Dr. Bowman placed before the jury a market share estimate of his view of Columbia's position in an open market. Since it had some support in the evidence, Dr. Bowman's evaluation of the non-local market and his disregard of competitors was for the jury to consider and evaluate.

NOTES *(Continued)*

Q. Well, did you try to estimate what share they would have gotten?

A. I--yes.

Q. What did you come up with?

A. My analysis suggests that the share they would have gotten would have been very small, essentially negligible.

Q. Essentially negligible?

A. Yes.

Q. [N]either Lane nor Columbia in the non-local--local area were much of a factor, yet you gave Columbia 50% of business and you gave Lane one or 2%. Why is that?

A. Because of the position that Columbia was in, with the facilities they had, production facilities, the ability to produce, the kind of equipment they had, the marketing strategy, the product line they offered, the expertise, the kind of connections they had in the business. They were doing fairly well in '73. As a matter of fact, they had 38% of that local area in 1973.

Q. Did you make any analysis--similar analysis of Lane Metal Product as a subsidiary of Bethlehem Steel to see if they had the ability to market in this area under your projections?

A. I didn't do a specific detailed study of Lane, no, I did not.

(Cross-examination of Dr. Bowman, N.T. 613, 614-15, 617).

After Dr. Bowman estimated how much pipe Columbia would have sold in unrestrained local and non-local markets, he multiplied these figures by the estimated selling price for each pound of pipe to ascertain Columbia's gross revenues. The next and final step in estimating the lost profits was to deduct Columbia's estimated expenses in a market free of Kaiser's antitrust violations.

Defendants contend several aspects of Bowman's projected expenses are unrealistically low. But to the extent Dr. Bowman's estimates were supported by some evidence on the record, we cannot state that the jury had no basis upon which to base its evaluation. Dr. Bowman arrived at a figure for Columbia's hypothetical interest expense that was quite low. The actual rate at which Columbia was able to borrow during the damage period was 3.75% above the prime rate. This money was obtained from Columbia's sole banking lender, the Philadelphia National Bank. Dr. Bowman found the average prime rate during the damage period to be approximately 8% (N.T. 559). Instead of using the average percentage of 11.75%--prime plus 3.75%--for Columbia's borrowing costs, Dr. Bowman estimated that in a free and open market Columbia's interest rate would have been 9.5%, the 1975 BAA bond rate. (N.T. 559).

Dr. Bowman admitted that companies of Columbia's size "would not generally borrow with bonds; that is, they tend to borrow directly from a bank instead of a bond." (N.T. 559). But there was testimony from the PNB bank officer for the Columbia account, that had Columbia not been injured by Kaiser's anticompetitive acts it would have been able to borrow funds more cheaply (N.T. 1310); the jury was informed that this bank would recover its unpaid loans (in excess of $320,000) from any award to plaintiffs. But the basis for Dr. Bowman's hypothetical interest rate was not "thin air." *In re IBM, supra* at 1019. There is no justification for entering a judgment notwithstanding the verdict on lost profits on the sale of aluminum culvert pipe.

LOST PROFITS ON CORRUGATED ALUMINUM SHEET

Columbia's business was fabricating culvert pipe. Although it never actually engaged in any other business, plaintiffs contend that Columbia was ready and willing to begin fabricating flat aluminum sheet, the product from which other fabricators make riveted rather than spiral pipe, and would have been able to do so but for Kaiser's antitrust violations. Therefore, plaintiffs sought, and the jury awarded, hypothetical lost profits on the sale of corrugated sheet. There was evidence that production facilities were modified to manufacture corrugated sheet during 1974, and Bonjorno estimated he could have sold 750,000 pounds of corrugated culvert sheet in 1975, 1-½ million pounds in 1976, and 2-½ million pounds in 1977. (N.T. 205).

To allow the award of lost profits for a business that was never actually in operation, the court must first decide whether plaintiffs' entry into such line of business would have been a natural outgrowth of an established business or an expansion into a new market. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 988 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). Relevant considerations include the "history of the expansion and growth patterns of other competitors in the relevant market," whether production facilities have to be varied significantly, and whether "customers for one unit would in all likelihood remain customers for other units." *Id.* Plaintiffs presented no direct evidence that the production of flat sheet was a natural outgrowth of pipe fabrication, but there was some evidence, if believed, that Columbia would have had other fabricators as sheet customers even though the customers for pipe would be direct users. There was evidence not only that the production facilities could be readily modified but that Columbia had so modified them and was equipped to manufacture and supply corrugated tube sheets after 1974 (N.T. 201-5). Therefore, the production of corrugated sheet could have been a natural outgrowth of Columbia's culvert business.

The court's second step is to determine whether plaintiffs presented sufficient evidence to allow the jury to determine that plaintiffs had an intention to enter the business and were

prepared to do so. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). There is much evidence if credited that plaintiffs had the requisite intention, but the record is not as clear that they were so prepared. The Fifth Circuit has listed four elements of preparedness: (1) the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; (2) the consummation of contracts by the plaintiff; (3) affirmative action by the plaintiff to enter the business; and (4) the background and experience of plaintiff in the prospective business. *Id., quoting Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

Plaintiffs were unable to finance the purchase of the raw material (aluminum coil) needed to manufacture the corrugated sheet. (N.T. 202). Mr. Bonjorno claimed this was because prices of the finished pipe had been so depressed by Kaiser that it was not economically profitable for customers to buy corrugated sheet, make it into riveted pipe and sell it at a competitive price. (N.T. 186, 202). Bonjorno's assertion that the price of finished pipe was depressed by Kaiser was contradicted by other evidence presented by plaintiffs at trial.

Dr. Bowman testified that in a free and open market the selling price of pipe can be broken down as: 65% for aluminum costs, 25% for other production costs, and 10% for profits (N.T. 537). Taking the cost of aluminum obtained from Alcoa's price lists published during the relevant years (N.T. 538), Dr. Bowman calculated the hypothetical unrestrained selling price of pipe. In Dr. Bowman's words, Kaiser's prices were "substantially the same" as those projected for a free and open market. (N.T. 1480). But the credibility of Bonjorno's explanation for Columbia's inability to enter the corrugated sheet market, whether he might have consummated a contract with Alcoa or sold corrugated sheet to Syracuse Tank, Lane Pipe or others and Columbia's readiness to enter the corrugated sheet business were all for the jury not the judge to assess.

GOING CONCERN VALUE

Defendants argue that plaintiffs cannot recover damages for loss of Columbia's value as a going concern because Columbia had not "terminated its business . . . as a consequence of an antitrust violation by Kaiser." (Defendant's Brief at 105). We agree.

A business that is forced to shut down because of antitrust violations is entitled to damages for loss of going concern value if proved. VonKalinowski, 15 *Antitrust Laws and Trade Regulation* §115.03[4] (1978) (citing cases). This was recognized in our Opinion of June 17, 1981 which rejected an argument that the damages awarded were duplicative. The Opinion recognized that losses for past net profits and reduction in the value of a business are not duplicative absent unique circumstances. Defendants argued that plaintiffs' recovery of lost past profits and their receipt of $574,000 from the sale of Columbia's assets to Howmet Aluminum Corporation ("Howmet") necessarily fully compensated them. But the value of the business as a going concern might have exceeded the amount received from Howmet at the time of sale were it not for the anticompetitive conduct of the defendants. Therefore, an award of damages for loss of value as a going concern was held non-duplicative of actual losses or projected losses from 1974 to 1977 and non-duplicative of the money received from the sale of Columbia's assets to Howmet, so long as the damage award for going concern value was properly adjusted to reflect only goodwill, that is, the discounted present value of the estimated flow of future earnings.

However, that opinion was based on the erroneous impression that the sale of Columbia's assets to Howmet was in May, 1977 the end of the damage period. At that time we did not have the argument on the correct facts more fully developed on the present record: that Columbia was a going concern in May, 1977. Significant intervening factors interrupted the causal connection between plaintiffs' antitrust violations and the going concern value of Columbia as of December 20, 1978 so that it would have been improper to allow recovery for loss of profits as

a going concern on that date. To the extent that we stated plaintiffs were entitled to both the lost past profits as of the time of the sale to Howmet (December 20, 1978) and the loss of value of the business as it would have been absent defendants' violation of law in May of 1977, we were in error because it is now clear that Columbia's business had not been terminated as of that date losses were allowed for its termination or destruction.

For recovery of "going concern" damages as well as any antitrust damages, it is well established that a plaintiff cannot prevail merely by proof that the defendant has violated the antitrust laws. He must prove that the violation had a causal relationship to the particular loss of anticipated revenue, that is, that the particular damage to plaintiff flowed from the conduct of the plaintiff. *Rea v. Ford Motor Company,* 497 F.2d 577 (3d Cir. 1974), *cert. denied,* 419 U.S. 868 (1979). *See also, Freedman v. Philadelphia Terminals Auction Co.,* 301 F.2d 830, 833 (3d. Cir.), *cert. denied,* 371 U.S. 829 (1962). Going concern damage is designed to compensate for the harm sustained when a business interest is unlawfully terminated as a result of an antitrust violation. Schneider, *Damages for Termination of a Business Interest,* 49 Antitrust L.J. 1295 (1980).

Antitrust cases concerning "going concern" or "goodwill" damages assume destruction, forced sale or other termination of the business as a necessary predicate to recovery. *Eiberger v. Sony Corp. of America,* 622 F.2d 1068 (2d Cir. 1980) (termination of office equipment dealership); *Pitchford, supra* (termination of scientific instruments dealership contract); *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971) (forced sale of newspaper carrier's route); *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964) (termination of service station lease and dealer contract); *Osborn v. Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963) (cancellation of service station lease and lessee's dealer sales arrangement); *Twentieth Century Fox-Film Corp. v. Brookside Theater Corp.,* 194 F.2d 846 (8th Cir.), *cert. denied* 343 U.S. 942 (1952) (forced sale of 15-year lease on motion picture theater).

The calculation of going concern value is made as of the date the plaintiff's business was terminated or sold as a result of the illegal conduct. *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 455 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970). As stated in *Farmington, supra*, "going concern" represents "the value which the business would have had at that time but for [the defendant's] illegal activity." 421 F.2d at 81. Accordingly, not only must there be a sale or cessation of the business but the date must be at the end of the damage period.

Plaintiffs operated their business as a going concern for approximately five months after May 31, 1977.[4] but plaintiffs elected May 31, 1977 as the end of the damage period. A government loan of $600,000 on or about that date permitted Columbia to continue in operation:

> Q. Now you said that the end of the damage period for which you are seeking damages is May--is what, I'm sorry.
>
> A. May 31, 1977.
>
> Q. Why did you pick that as the end of the damage period?
>
> A. It was just about that time or shortly thereafter that we received the proceeds of the EVA [sic EDA] loan, and the metal that the proceeds permitted us to purchase. Had it not been for that loan we would have then had to close our doors once and for all, and we felt that that represented a conservative and fair place to end the damages.

(N.T. 167).

Thereafter, plaintiffs, supplied with aluminum by Alcoa, operated their business as a going concern. Plaintiffs sold Columbia on December 20, 1978, over a year after May 31, 1977, the date plaintiffs concede to be the end of the damage period The proceeds of a loan of $600,000 plaintiffs received from the Economic Development Administration of the United States Department of Commerce were used in the manufacture of steel and aluminum pipe:

> Q. And after it got the $600,000, Columbia went back into operation, did it not?
>
> A. Yes, it did.
>
> Q. And during that time it made aluminum and steel pipe, did it not? . . .
>
> A. We made some small quantity. We tried to make some small quantity of steel pipe, yes.
>
> Q. And you made aluminum pipe?
>
> A. Yes, we did.
>
> Q. What company supplied you with aluminum?
>
> A. Alcoa.
>
> Q. How long was Columbia in operation after it got the $600,000?
>
> A. Approximately five months.
>
> Q. And you stopped production again?
>
> A. Yes.

(N.T. 296-7).

---

4. Although Columbia suspended its production, it never ceased doing business altogether prior to May 31, 1977:

> Q. Was Columbia Metal open and in business until at least May 31, 1977?
>
> A. Yes, we were.
>
> Q. Had you ever closed your doors?
>
> A. No, we never had.

(N.T. 150—Bonjorno).

Although the jury could reasonably have used May 31, 1977 as the end of the damage period for purposes of calculating lost profits, it could not as a matter of law apply this date as the commencement of "going concern" damages. May, 1977 was not the time of business termination but rather the time of its rejuvenation. By the time Howmet purchased Columbia the following year and began to reoperate as Howmet Columbia (N.T. 756-57), the going concern value of the company was substantially altered by the receipt of the government loan and numerous other market forces during the period of operation and thereafter.

With respect to going concern damages, the loan of substantial government funds in May, 1977 is not simply another factor to be accounted for by the jury in its overall assessment of the amount of damages due. The $600,000 EDA loan made it possible for Columbia to continue in operation as a going concern. For although Columbia ceased its production in 1975, it "kept its doors open" and renewed production in 1977 *as a result of the EDA loan.* (N.T. 167-69). A business which is in operation, as was Columbia in May, 1977, cannot receive damages for loss of profits it would have had as a going concern. Loss of going concern value is for a concern no longer going, that is, terminated by liquidation or forced sale.

Plaintiffs filed this action in January, 1974; at trial they chose May, 1977 as the conclusion of the damage period; they foreclosed their ability to reccover damages for the time they continued to operate with government financing. The cessation of their operations five months thereafter and sale of the assets of a defunct operation one year after that cannot be attributed to Kaiser on this record. If the jury were to go beyond the damage period to the actual date of sale, charge Kaiser with responsibility for the sale and then assess going concern damages flowing from defendants' activities as of December, 1978, the jury would be forced to rely on prohibited speculations and guesswork.

> If . . . the record discloses that the evidence on which the verdict is based is so critically deficient of proof of an essential fact needed to support the verdict that the jury could only have ventured a guess as to its occurrence, then a judgment notwithstanding the verdict is required.

Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1099 (3d Cir. 1980) *citing Denneny v. Spegel,* 407 F.2d 433, 442 (3d Cir. 1969) and *Neville, supra* at 1210 n.5.

The uncontested testimony of the plaintiffs that the EDA loan made possible the continued operation of the business beyond the damage period barred recovery for future loss of profits as a going concern as a matter of law even if the record is viewed in the light most favorable to plaintiffs. Therefore judgment for defendants notwithstanding the verdict will be entered as to the damages awarded in Interrogatory 4. We find it neither necessary nor appropriate to grant a new trial because of this issue. A new trial could not change the result as to these damages; the evidence as to the other items of damages and its consideration by the jury was sufficiently distinct to permit their award even if the damages for loss of going concern value is set aside.

Defendants assert several other grounds for the deficiency of the evidence on going concern value, including that the capitalization of profits should have been on a pre-tax instead of after-tax basis and that the use of a 10% capitalization rate was too high for a company such as Columbia. Defendants argue these points persuasively but upon evidence not offered at trial or the proper subject of judical notice at this time; without such evidence on the record it is inappropriate for the court to consider it in the context of post-trial motions. In any event, these matters are moot in light of our denial of going concern damages on other grounds.

OTHER GROUNDS FOR JUDGMENT N.O.V.

Three other contentions of defendants in support of judgment in their favor notwithstanding the jury verdict for plaintiffs merit discussion.

Defendants objected to the admission of evidence on lost profits on sales beyond the relevant geographic area as stipulated by the parties.[5] The evidence of non-local sales which was the basis of plaintiffs' projections undeniably extended beyond the geographic area agreed to by the parties for the purpose of determining liability. But it was not agreed to as a limitation on plaintiffs' damage estimates. As long as there was some evidence that Columbia would have made sales beyond that geographic area, as there was, plaintiffs were entitled to have the jury consider those estimated sales. *Pitchford, supra* at 108-09.

Defendants contend that whatever the actual losses or lost profits, for all practical purposes, Columbia's business was terminated prior to 1977 so that damages could not in any event be awarded beyond 1975. This issue was vigorously pursued on examination and cross-examination of witnesses for both sides and argued to the jury thereafter. The jury was instructed to award damages only for those years during which it was reasonable for Columbia to have continued to operate its business for purposes other than the claim of damages in suit. (N.T. 1540-41). The jury had an adequate basis upon which to decide the length of time for which damages might be awarded to plaintiff.

Defendants also contend that the judgment should be set aside because plaintiffs' theory of damages and the evidence adduced to support it contradicted the theory of liability based upon a "price squeeze." Among the joint activities of defendants relied on by plaintiffs at the trial on liability was a "price squeeze" by which KACC raised the price of aluminum sheet sold to other fabricators; aluminum sheet was transferred to KACSI at a price that permitted KACSI to sell Kaiser fabricated culvert at a low price with which other fabricators could not complete. That is, the difference between the price of the raw material charged by Kaiser and others, such as Alcoa, presumed to follow its lead, and the price charged for the finished product by Kaiser made it impossible for other companies not vertically integrated to sell the finished product competitively.

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5. The stipulated area extended north through Rhode Island, south through Northern Virginia, and west through eastern Pennsylvania.

In this trial on damages, the calculations of plaintiffs' expert on prices in a free and open market tended to contradict the "price squeeze" theory. The prices he used for raw material (aluminum coil) were the actual prices charged by Alcoa in 1974-77 at which time it allegedly followed the lead of Kaiser. He used these prices to establish a fair selling price in a freely competitive market; those prices were admittedly nearly identical to the average direct selling price actually charged by Kaiser in the damage period. (N.T. 1478-80). Plaintiffs' expert also testified that the relationship between metal cost and the selling price of culvert pipe in a free and open market would have been 65% of sales; Columbia's financial statements for the year 1970 through 1975 showed a raw material cost approximating 65% of sales in each year. Thus, plaintiffs' evidence at the retrial on damages cast some doubt on a "price squeeze" as the basis for liability.

But a "price squeeze" was just one of a number of activities relied upon by plaintiffs at the first trial from which liability might have been found. There was sufficient evidence from which a jury might have inferred that KACSI: attempted to drive Columbia out of business; threatened to place a plant near Columbia if it purchased raw material from other than Kaiser and then later opened a plant in Delaware that had originally been planned for Virginia; charged lower prices from that plant, particularly in southern New Jersey; and extended credit to a former salesman of Columbia against the recommendation of KACSI's credit department. A jury finding on the anticompetitive significance of each of these acts was not requested and no special interrogatories were submitted as to which of the alleged categories of activities violated the Sherman Act or caused antitrust injury to Columbia.

At the first trial plaintiffs estimated damages by using four projection Methods (Methods C, D, E, and F). Method C (P-3012) projected Columbia's sales based upon government figures on new housing starts and new highway construction during the damages period. Method D (P-3013) projected Columbia's sales by utilizing defendant Kaiser's nationwide sales, while Method E (P-3014) used Kaiser sales from the new

Castle, Delaware plant only. Method F (P-3011) relied upon Joseph Bonjorno's estimates of Columbia's potential sales and profits were it not for defendants' wrongdoing. At the time the post-trial motions were decided it did not appear liability and damage issues were inextricably interwoven. The trial on damages and liability had been bifurcated by agreement of the parties, so that there seemed little basis to believe the jury verdict would have been the result of compromise on the liability and damage issues. Because the liability and damage issues seemed sufficiently distinct and severable, a new trial on damages only was deemed fair to both parties and was so ordered. But *cf.*, *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981) (plaintiffs' failure to prove five of six alleged exclusionary activities and lack of certainty that jury based its verdict exclusively on the one remaining practice required all findings on liability set aside; a partial new trial limited to redetermination of damages held improper unless it clearly appeared the issue to be retried was distinct and separable).

Notwithstanding the vigor with which plaintiffs' urged the unassailability of their damage evidence on their motion for reconsideration (later withdrawn), at the damage retrial plaintiff proffered a different expert and a different method for calculation of Columbia's hypothetical share of a freely competitive market. This new testimony on damages if heard by the liability jury might have influenced it to reject or discount the contention of a "price squeeze" by the Kaiser defendants. But this circumstance certainly does not compel the entry of judgment in defendants' favor notwithstanding the verdict. At most it reflects the unforeseen difficulties arising from a limited retrial on damages. Since the court rules now only on post-trial motions concerning the retrial on damages, this consideration is for the Court of Appeals.

The court has considered all other arguments for the entry of judgment notwithstanding the verdict and found them to be without merit.

MOTION FOR NEW TRIAL

When a party moves for judgment notwithstanding the verdict or in the alternative for a new trial, and the court grants judgment notwithstanding the verdict, it is imperative that the court rule on the new trial request so that the litigation will not be needlessly protracted if the judgment is thereafter vacated or reversed by the appellate court. Fed.R.Civ.P. 50(c); 15 Wright & Miller, *Federal Practice and Procedure* §2539 (1971). Defendants advance four grounds for a new trial: that the conduct of plaintiffs' witnesses and counsel was prejudicial and improper; that the verdict was against the weight of the evidence; that the verdict was excessive; and that legal errors were committed throughout the trial.

Plaintiffs' counsel and witnesses during the retrial made some remarks irrelevant to damages issues and prejudicial to Kaiser. Notwithstanding extended discussion with counsel prior to trial and admonitions to counsel during the trial, the findings on liability were overstated or referred to unnecessarily. The testimony of plaintiffs' principal witness conveyed resentment of Kaiser which was not surpising. It seems that a trial limited to damages presented difficulties to counsel for both parties. But these were lapses from perfection in the course of lengthy, complex and vigorously contested proceedings. After reviewing the record as a whole and the instructions to the jury to consider only the issues on damages without prejudice or bias, we are of the opinion that the conduct of plaintiffs' counsel and witnesses does not warrant a new trial on damages.

A new trial may be granted on the ground that the verdict is against the weight of the evidence. *Neville, supra;* 6A *Moore's Federal Practice* ¶59.08 [5] (1982). In terms of the amount of damages awarded, a new trial may be granted when the damages assessed by the jury are "so unreasonable as to offend the conscience of the Court." *Murray v. Fairbanks Morse*, 610 F.2d 149, 152 (3d Cir. 1979). Stated either way, such a motion for a new trial is within the sound discretion of the court. *Id.* at 153. In exercising its discretion, the court may weigh the parties' evidence instead of looking only to whether the verdict winner

has introduced sufficient evidence on each essential element to preclude judgment as a matter of law. *Moore's Federal Practice, supra.* Greater scrutiny of a verdict is called for when the trial is "complicated and deals with a subject matter not lying within the ordinary knowledge of jurors." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960).

Even on a motion for a new trial judicial discretion must be exercised in a manner consistent with plaintiff's right to a trial by jury. The court may not substitute its own judgment for that of the jury merely because the judge as the finder of fact might have reached a different conclusion. That well established principle is not obviated simply because the trial is bifurcated.

> (N)either a trial nor an appellate court has the authority to substitute its judgment for that of the jury and thus usurp the jury's function as the principal finder of fact.

Collins v. Signetics Corp., 605 F.2d 110, 115 (3d Cir. 1979).

At the prior trial this court was guided by that principle. Based on the law of the case determined by the Court of Appeals, it found the evidence sufficient to support the jury's conclusion that defendants monopolized or attempted to monopolize the relevant product market in violation of Section 2 of the Sherman Act. The jury's determination on liability was not so against the weight of the evidence as to shock the conscience of the court. But the deficiency in plaintiffs' proof of damages convinced the court that the verdict as to damages should not stand. The evidence presented by the damage witnesses was incomplete, confusing and lacking in probative value and the factual basis for the estimates of losses was not made clear by the testimony. Since the damage award on that inadequate record had to be vacated, no explicit statement as to excessiveness was deemed necessary to the decision. After a retrial on damages at which plaintiff offered a different expert on damages and a new theory of the measure of damages or at least a new way of calculating damages, the court is faced with a difficult question: if plaintiff could not substantiate an untrebled award of

$1,815,000 at the first trial on damages, what is the effect of an untrebled award of $3,189,313 at this trial?

The record on retrial was different and more fully developed. The evidence was sharply in conflict; the issues were pointedly raised by the direct testimony and extensive cross-examination. Almost all of Bonjorno's statements on the financial history of his company, the state of the market for the years in question, his future intentions and the prospects of Columbia required credibility determinations. The implausibility of deeming Columbia an operating business between 1975 and 1977 was effectively raised. The witnesses on behalf of plaintiffs were subject to impeachment for lack of knowledge, prejudice against Kaiser or interest in the outcome of the case. The assumptions of plaintiffs' expert on the size of the market, Columbia's projected 50% share of a local market and 30% of the entire market were challenged as ignoring viable competitors, inflating revenues and deflating expenses. But all of this was placed before the jury by a fair charge; its role as factfinder in weighing the contradictory evidence and inferences and in drawing the ultimate conclusions as to the facts cannot properly be ignored. Whether the trial judge would reach the same conclusions is irrelevant. So long as evidentiary support for their jury findings exists, "we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Therefore the court must refuse to set aside this verdict as excessive and respect the role of the jury in judging the credibility of the witnesses, assessing the weight given to expert opinions and resolving conflicting evidence.

Two judges have previously taken these questions from a jury. At the initial trial, a verdict was directed for defendants at the end of the plaintiffs' case on the ground that the evidence was insufficient to establish a market composed of aluminum culvert pipe or a monopolization of the relevant culvert pipe market and there was insufficient evidence of conspiracy in restraint of trade. The Court of Appeals reversed and remanded for trial. Following that trial, judgment on the verdict in favor of plaintiffs on liability and damages was set aside and a new trial

ordered on damages only. Now this court is requested to set aside a second award of damages by another jury.

"Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party." *Louisville & Nashville Railroad Co. v. Woodson*, 134 U.S. 614, 623 (1980). Wright and Miller, commenting on this dictum in *Federal Practice and Procedure*, Vol. 11 § 2803 at p. 35, observes:

> Of course there is no question but that a third trial may be ordered when the second trial, like the first, has been marred by a legal error. The more difficult question is whether the trial court may set aside successive verdicts as excessive, or against the weight of the evidence. That the power to do so exists seems perfectly clear, but it is equally clear that it is a power to be exercised only in the most exceptional cases. When two juries have reached substantially the same result, the possibility of a miscarriage of justice is very slight. [Footnotes omitted].

The usual circumstances weighing against the exercise of discretion in ordering a third trial on damages were well expressed by the trial judge in *Frank v. Atlantic Greyhound Corp.*, 177 F. Supp. 922 (D.D.C. 1959), *aff'd*, 380 F.2d 628 (D.C.Cir. 1970):

> When a new trial is granted on the ground that the verdict is contrary to the weight of evidence, or on the ground that the damages awarded by the jury are excessive or inadequate, the trial judge takes this action to prevent what he finds to be a miscarriage of justice. This step is taken only in exceptional cases, as great weight must ordinarily be accorded to the verdict of a jury. If a second jury arrives at the same result as did the first, the trial judge may well pause before setting aside the second verdict. Under such circumstances the parties have had two trials. The fact that two juries in effect agreed is entitled to a great deal of significance. Bearing in mind that a motion to set aside a verdict of a jury on the facts should be sparingly granted under any circumstances, *a fortiori* a second verdict reaching substantially the same result on practically the same evidence

> should greatly increase the hesitancy of the Court to award another trial. The possibility that a miscarriage of justice has resulted is greatly diminished under such circumstances. After all, there must be some point at which the granting of new trials in the same case should ordinarily stop. It may well be that if another new trial were granted, the same result would again be reached by a third jury.

177 F. Supp. at 923.

Here these circumstances are not present. The first new trial on damages was granted because there was a lack of an evidentiary basis for expert estimates not just because the verdict was against the weight of the evidence. Moreover, on retrial plaintiffs (perhaps because of the inadequate testimony of their previous damage expert), presented not only a different expert but a different theory of damages or at least a far different method for its calculation. So there has not been a second verdict reaching the same result on practically the same evidence.

But a trial judge should still pause before setting aside this second verdict because of the peculiar procedural posture of this case. The court's discretionary grant of a new trial is now limited to retrial on damages only. Defendants strenuously object to the fairness of this procedure (Defendants' Brief, pp. 18-60) and have preserved for appeal their argument that in practice if not in theory it was prejudicial error. It may be that if another new trial on damages were granted, the same result might again be reached by a third jury but would again be subject to the same objections, reviewable only on appeal. This court's determinations on liability will also be reviewed when this matter is again considered by the Court of Appeals. There may be no retrial at all but if there is to be a one, guidance from the Court of Appeals on the determination of the liability issues and the scope of the retrial is in the interests of the administration of justice and the need of the parties for the final termination of this litigation.

For the above reasons, a new trial as to damages is denied. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

INTERROGATORIES TO THE JURY

1. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused actual losses to Columbia? None___ $ 728,000

2. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused lost profits (exclusive of actual losses) to Columbia on the sale of aluminum culvert pipe? None___ $ 742,520

3. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused to Columbia lost profits (exclusive of actual losses) on the sale of flat corrugated aluminum sheet? None___ $ 80,000

4. In what amount, measured in dollars and cents, do you find from the evidence that Kaiser caused damage to Columbia for the diminution in value of its business? None___ $1,638,793

/s/
Foreperson

Date: 12/2/81

PLEASE NOTIFY THE MARSHAL
WHEN DELIBERATIONS HAVE BEEN COMPLETED

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORP. AND KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, it is hereby ORDERED that:

1. The motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment N.O.V. is GRANTED with respect to the jury award of $1,638,793 in response to Interrogatory Four as to damages and otherwise DENIED.

2. The alternative Motion of defendants for a New Trial is DENIED.

3. Judgment will be entered on the verdict of the Jury as follows:

Actual Losses	$ 728,000
Lost Profits (Pipe)	742,520
Lost Profits (Sheet)	80,000
	$1,550,520
Trebled According to Law	×3
	$4,651,560

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY, as Transferrees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.	:	CIVIL ACTION
vs.	:	
KAISER ALUMINUM & CHEMICAL CORP. and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

FINAL JUDGMENT

AND NOW, this 17th day of January, 1983, the Court of Appeals having granted a remand for the purpose of determining Kaiser's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial filed by Kaiser, the motion of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. for Judgment Notwithstanding the Verdict having been granted in part and denied in part and the motion of defendants for a new trial having been denied,

IT IS ORDERED AND ADJUDGED

That the plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby, as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc. recover of defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. the amount of $4,651,560 with interest at the rate provided by law and their costs of action.

/s/ Norma L. Shapiro
J.

BONJORNO, Joseph A., Kerr, George M., and Clisby, Barbara K., as Transferees of Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., Appellants and Cross-Appellees,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION, Kaiser Aluminum & Chemical Sales, Inc., Robert A. Kennedy and Kennedy Culvert & Supply Company and Robert Kennedy, Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc., Appellees and Cross-Appellants.

Nos. 83-1047, 83-1079.

United States Court of Appeals,
Third Circuit.
Argued Sept. 13, 1983.
Decided Dec. 27, 1984.
Opinion on Denial of Rehearing and
Rehearing En Banc March 8, 1985.

Henry T. Reath, Michael M. Baylson (argued), Eric H. Auerbach, Richard L. Thurston, Duane, Morris & Heckscher, Philadelphia, Pa., for appellants and cross-appellees.

Richard P. McElroy (argued), William H. Roberts, Alexander D. Bono, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., Stephen B. Ringwood, Kaiser Aluminum & Chemical Corp., Oakland, Cal., for appellees and cross-appellants.

Before SEITZ, GIBBONS and ROSENN, Circuit Judges.

OPINION OF THE COURT

SEITZ, Circuit Judge.

I.

The plaintiffs appeal from an order of the district court partially granting judgment notwithstanding the verdict which eliminated the largest element of the jury's damage award in an

antitrust action. The defendants, Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc. (collectively "Kaiser") cross-appeal from a judgment entered after a special jury verdict finding them in violation of the antitrust laws. This court has jurisdiction under 28 U.S.C. §1291 (1982).

II. Background

The plaintiffs were the sole stockholders of the now defunct Columbia Metal Culvert Co., Inc. ("Columbia") which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. They allege that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of sections one and two of the Sherman Act, 15 U.S.C. §§1 and 2 (1982).

Columbia began to manufacture aluminum drainage pipe in 1962. Originally, Columbia purchased all of its raw materials from Kaiser. The raw material for manufacturing pipe comes in two primary forms: corrugated aluminum sheet which is rolled and riveted into pipe, and aluminum coil which is formed into helical pipe by a spiraling machine. Initially, Columbia purchased only sheet, but in 1970, it acquired a spiraling machine, and thereafter produced mostly pipe formed from coil.

In 1972, Columbia and Kaiser had a falling out, after which Kaiser no longer sold coil to Columbia, which thereafter purchased its raw materials from Alcoa and Reynolds. In 1973, Columbia's best salesman, Robert Kennedy, left Columbia to become an independent distributor of Kaiser's aluminum pipe. At the same time, Kaiser opened a pipe fabrication plant only a few miles from Columbia's. In 1974, Kaiser along with the other major aluminum producers raised the prices of aluminum coil and sheet to roughly the same price that Kaiser charged for the finished pipe. Throughout this period, Kaiser produced approximately 80% of all the aluminum pipe used in Columbia's geographical marketing region.

The plaintiffs allege that as a result of Kaiser's conduct, Columbia began experiencing financial difficulties, and stopped producing pipe in 1975. Eventually, Columbia's assets were sold

to a third party in 1978. In 1981, the third party sold the remaining assets of Columbia to Kaiser.

This action was first filed in January of 1974 under section four of the Clayton Act, which gives a private cause of action under the antitrust laws, alleging, *inter alia*, violations of sections one and two of the Sherman Act. At the first trial in 1977, the district court directed a verdict for Kaiser at the conclusion of plaintiff's evidence. This court reversed, holding that there was sufficient evidence to permit the case to go to the jury. *Columbia Metal Culvert Co., Inc. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied* 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978). A second trial held in 1979 resulted in a jury verdict for the plaintiffs and an award of damages. The district court, however, granted in part the defendants' post-trial motion for a new trial by ordering a trial on damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F.Supp. 102 (E.D.Pa.1981). A limited retrial was conducted in 1981, resulting in a damage award of $9,567,939 after trebling. The district court then granted, in part, the defendant's motion for judgment notwithstanding the verdict, reducing the judgment to $4,651,560. 559 F.Supp. 922 (Pa.1983)

The plaintiffs appeal the reduction of the damage award, and the defendants cross-appeal the failure of the district court to grant a new trial or to grant in full their motion for a judgment notwithstanding the verdict. We turn first to the defendants' cross-appeal.

III. The Doctrine of Intra-Enterprise Conspiracy

The defendants contend that the jury verdict must be set aside and a new trial ordered because of the recent decision in *Copperweld Corp. v. Independence Tube Co.*, ____ U.S. ____,104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). In that case, the Supreme Court held that a parent corporation and its wholly owned subsidiary cannot be considered separate entities for purposes of section one of the Sherman Act. Thus, a parent corporation and its wholly owned subsidiary cannot by themselves violate that provision which requires concerted action by

at least two participants. Because the two entities in the section one claim in this case are the Kaiser Aluminum & Chemical Corporation ("KACC") and its wholly owned subsidiary Kaiser Aluminum & Chemical Sales, Inc. ("KACSI"), the defendants contend that the finding of liability must be set aside if the *Copperweld* rationale is applicable to this case.

This court had previously held that the plaintiff could proceed with a section one claim based on a conspiracy between the parent KACC and its subsidiary KACSI. 579 F.2d at 33-35. After oral argument was heard on this appeal, the Supreme Court granted the petition for certiorari in the *Copperweld* case. The parties were asked to submit supplemental briefing on the potential effect of *Copperweld.* After due consideration, we decided to defer resolution of this appeal until after the Supreme Court decided *Copperweld.*

Having now considered the decision of the Supreme Court, we believe that it is unnecessary to reach the issue of the applicability of *Copperweld* because the damage award may be sustained solely on the separate section two verdicts that do not depend on a theory of intra-enterprise conspiracy. Kaiser contends that when a verdict may rest on either of two claims, one supported by the evidence and the other not, a judgment thereon must be reversed. *See Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979). The case that Kaiser cites, *Simko,* rested on a general verdict in which it is impossible to determine if a jury found the defendant liable on both grounds or only one ground. In this case, special interrogatories were submitted to the jury on each of the theories of liability, and the jury determined that the defendants violated both section one and section two of the Sherman Act. Under these circumstances, we are not required to remand for a new trial solely because the section one claim may be invalid.

The defendants argue, however, that the causation of damages from the monopolization and attempt to monopolize verdicts are also tainted by the theory of intra-enterprise conspiracy. The jury returned separate verdicts against the defendants for monopolization, attempt to monopolize, and

conspiracy to monopolize under section two. Although the conspiracy verdict, which depended upon an intra-enterprise conspiracy, was separately rendered, only a single interrogatory was asked as to causation of injury. The jury answered "yes" to the question: "[W]as any such defendants' monopoly, conspiracy to monopolize, or attempt to monopolize as found by you a material and proximate cause of any injury to the business or property of the plaintiff?"

The defendants contend that *Copperweld* must necessarily apply to a section two conspiracy to monopolize, and since the jury was not asked separate questions on proximate cause, it is impossible to determine if the jury found that the injuries were caused by an impermissible theory of liability. The defendants' contentions succeed only if it were possible that the jury could infer that some of the plaintiffs' injuries resulted solely from the conspiracy and not from the monopolization or attempt to monopolize. Assuming without deciding that *Copperweld* applies to a section two conspiracy, we conclude that it was not possible for a reasonable jury in this case to find that injury was caused by conduct pursuant to the conspiracy that was not also conduct in furtherance of the monopolization or the attempt to monopolize.

Specific intent is an element of a conspiracy to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 154 (3d Cir.1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982). Because the jury was charged that it had to find that there was a specific intent to monopolize before returning a verdict on conspiracy to monopolize, the jury necessarily found that both the parent KACC and the subsidiary KACSI had the specific intent to monopolize the aluminum pipe market. Thus any concerted activity undertaken in the conspiracy that could give rise to damages would have been undertaken with the purpose of monopolization. Because the conspiracy defendants are the same defendants in the monopolization and attempt to monopolize charges, any activity in the conspiracy, which must

have had the purpose of monopolization, would necessarily be attributable to the same defendants as part of the monopolization or attempt to monopolize.

Furthermore, the defendants do not point to any evidence in the record that evinces actions in the conspiracy that could give rise to damages and that are not necessarily part of the attempt to monopolize or the monopolization. Thus, under the particular circumstances of this case, we conclude that the jury verdict and award of damages would be the same even if the jury had not been instructed that KACC and KACSI could be considered separate entities.

IV. The Monopolization Claim

A. The Effect of This Court's Decision in 1977

We next turn to Kaiser's contention that its motion for a judgment notwithstanding the verdict should have been granted because the evidence was insufficient to support the claim of monopolization or attempt to monopolize. The plaintiffs argue that Kaiser may no longer raise this issue because this court had determined on the appeal from the first trial that there was sufficient evidence of monopolization to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978).

The evidence presented at the liability 1979 trial, however, differed in several material respects from the evidence presented at the first 1977 trial. In particular, the plaintiffs' evidence at the later 1979 trial significantly undercut the economic significance of the facts that the parent KACC charged its subsidiary KACSI a price for aluminum sheet and coil that was well below the market price while at the same time KASCI was selling coil to independent pipe fabricators at the higher market price. Kaiser's pricing policies with respect to its subsidiaries and to independent fabricators were elements of our earlier decision. 579 F.2d at 31.

Because there were material differences in the evidence presented at the two trials, we believe that the question of the

sufficiency of the evidence presented at the 1979 liability trial is still open for review. *See Johnson v. Bernard Ins. Agency, Inc.*, *532 F.2d 1382, 1384 (D.C.Cir.1976).*

B. Sufficiency of the Evidence of Monopolization

There are two main elements in monopolization: "(1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *Borough of Landsdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir.1982).

Kaiser's contentions on liability in this appeal go to the question of whether there is insufficient evidence that its alleged conduct demonstrates the willful acquisition or maintenance of monopoly power.[1]

In reviewing a record for sufficiency of the evidence, this court must expose the evidence to the light most favorable to the non-movant with the advantage of every fair and reasonable inference. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

1. *Kaiser Attempted to Control Its Competition.* There was evidence that Kaiser attempted to control the independent fabricators by requiring them to purchase all of their raw materials from Kaiser. Mr. Bonjorno of Columbia, and Mr. Arvay of U.S. Aluminum, a South Carolina fabricator, both testified that Kaiser attempted to coerce the fabricators into purchasing only from Kaiser. There was testimony that Holmes Collins, the Kaiser manager of the division that manufactured

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1. In this appeal, Kaiser does not contest that the relevant product market is aluminum drainage pipe, or that the relevant geographic market is the Mid-Atlantic states. Nor do any of the issues raised by Kaiser in this appeal relate to whether it possessed monopoly power or whether that power was a consequence of a superior product, skill, or historical accident.

and marketed the aluminum pipe, threatened to open a pipe fabrication plant "across the street" from Columbia if it purchased its raw materials from other sources. There were threats that if Kaiser saw so much as one pound of metal from another producer that it would terminate its relationship with Columbia. When Columbia did purchase aluminum from another company, Kaiser carried through with its threats by locating a pipe plant only 40 miles from Columbia's and by refusing to sell any more coil to Columbia. Finally, there was evidence that Holmes Collins told Columbia's owners that Kaiser would control Columbia's growth and market.

From this evidence, a jury could infer that Kaiser wanted to control the source of the raw materials for the independent fabricators and thus, indirectly, wanted to control the price of independents' finished pipe. The mere location of a plant, or the unilateral refusal to deal may not, by themselves, be antitrust violations. However, the combination of the threats as well as evidence that Kaiser's management had originally requested that the plant be located elsewhere is evidence from which a jury could legitimately infer that Kaiser attempted to control its competition, and failing that, tried to destroy it.[2] *Schine Theatres v. United States,* 334 U.S. 110, 119, 68 S.Ct. 947, 952, 92 L.Ed. 1245 (1948) (threat of opening theatres by a monopolist is evidence of intent) (*Copperweld, supra,* overruled the section one charge in *Schine,* but re-affirmed the section two charge).

2. *Kaiser's Actions to Destroy Columbia.* In addition to locating a plant near Columbia's, the plaintiffs allege that Kaiser engaged in a series of deliberate acts to drive Columbia out of the pipe market. The most serious claims is that Kaiser deliberately raised the price of the raw materials to the same level as the price that it charged for the finished pipe, thus making it impossible for Columbia to operate at a profit if it sold pipe

2. Further evidence of Kaiser's attempt to control or exclude competition lay in the veiled threats that Holmes Collins made to Alcoa. Alcoa's manager testified that Collins stated that "if [Alcoa] thought that [it] could sit back and enjoy a participation in this market by merely being a supplier of coil sheet to independent pipe fabricators, [Alcoa] had another thing coming, or some words to that effect." App. at 1085.

competitively with Kaiser. The plaintiffs term this price condition a "price squeeze."

The evidence and the record show that for a significant period of time in 1974, the distributor list price of Kaiser's aluminum pipe, per pound, was just above, or even below, the market price for aluminum coil. The mere existence, however, of a "price squeeze" is not necessarily an anti-trust violation. The plaintiff must present evidence that the defendants deliberately produced the effect, sufficient to provide a reasonable basis for the jury to conclude that the "squeeze" was not the result of natural market forces such as supply and demand or legitimate competition. *Cf. California Computer Prods. Inc. v. IBM,* 613 F.2d 727, 735 (9th Cir.1979).

To show that the price squeeze was a deliberate act on the part of Kaiser, the plaintiffs produced evidence that Kaiser controlled both the price of the raw material and the price of the finished pipe, and that Kaiser exercised that power. That Kaiser could control the price of the finished pipe is evident. By setting the price at which it is sold to distributors, Kaiser effectively controlled the prices at which the distributors bid to contractors. Further, because of Kaiser's large market share, it was likely that it or one of its distributors would be bidding on nearly every job. In this fashion, Kaiser, if it desired, could keep the prices of the pipe low.

The plaintiffs' evidence of Kaiser's control over the prices of the raw material, aluminum coil, is more problematic. In part, it lies in understanding the nature of the market for aluminum coil and sheet used in fabricating pipe. Prior to 1974, Kaiser and some of the other aluminum producers maintained a separate price list, called a commodity price, for aluminum alloy sold to fabricators to manufacture pipe. The commodity price was usually lower than the general or specification price charged for the same alloy used for other purposes. It was never contended, however, that Kaiser lost money at the lower commodity price, and KACSI usually reported a profit from the sale of coil and sheet at the commodity price. App. at 4674-4824.

Kaiser was not the largest supplier of aluminum coil or sheet to independent fabricators, although if the aluminum used

by its own pipe plants were included, it produced over 80% of the aluminum used for making pipe. Kaiser contends that since it was not the dominant force in the commodity price market for aluminum coil and sheet, it did not control the prices of the raw materials. The plaintiffs' theory, however, was that Kaiser was a price leader, and that Reynolds and Alcoa, the other major aluminum producers, usually followed Kaiser's pricing strategy. Thus, Kaiser's prices would determine the market prices.

The principal evidence in support of this theory was the testimony of Professor Oliver Williamson, an economist and expert in antitrust. He testified that the aluminum industry was an oligopoly limited to a few major producers of aluminum, and that in particular lines of aluminum products, one of the producers became dominant and set the pricing strategy for the rest of the industry. He indicated that the other aluminum producers usually followed the price leader because if an aluminum producer did not comply, it would not be followed in the areas where it was dominant. He further indicated that there were economic studies that tended to show that the price leadership phenomenon was especially noticeable during the early to mid-1970's and that aluminum prices were kept high by the producers during the relevant period.

Further, Dr. Williamson testified that he believed that Kaiser was the dominant firm in setting the prices for aluminum coil and sheet used in making pipe. Dr. Williamson's opinion that Kaiser was the dominant firm in the aluminum pipe area was buttressed with evidence that showed that Kaiser was the largest producer of coil used for pipe, that it was the only major manufacturer who had an extensive marketing and engineering staff who actively promoted and studied the uses of aluminum pipe, and that Kaiser had the largest interest in pipe prices because it sold over 80% of the aluminum pipe in the country. If there were price leadership, it would be most likely that Kaiser set the pricing policies because of its extensive expertise and investment, rather than Reynolds of Alcoa who had so little involvement in the area.

That there was price leadership was supported by the testimony of Thomas Melrose, a manager of Alcoa, and Lonsdale

Lawrence, an engineer from Reynolds. Melrose testified that Alcoa did not independently set prices but followed the prices that Kaiser and Reynolds set for the corrugated aluminum sheet used for making pipe. Lawrence testifed that for corrugated sheet, Reynolds would follow Kaiser's announced prices each time the prices changed. Although Melrose's and Lawrence's testimony was in reference to corrugated sheet and not to coil, their testimony confirms Dr. Williamson's general observations on the existence of price leadership in the aluminum drainage pipe raw material market. Further, the evidence indicated that the prices for coil and sheet as raw materials for pipe did not differ in material respects.

Kaiser contends, however, that the plaintiffs' documentary evidence on the actual prices charged by the three major manufacturers failed to show price leadership. In particular, Kaiser points to evidence that on one occasion Alcoa raised the price of aluminum coil three days before the effective date of Kaiser's comparable price change as proof that Alcoa, and not Kaiser, was the price leader.

Dr. Williamson testified, however, that a pricing change did not have to be initiated by the price leader. Also, Alcoa's price change, although occurring three days before the effective date of Kaiser's change, may have been made after Kaiser announced its change either publicly or privately.

At most, Columbia's pricing evidence was susceptible of an inference inconsistent with price leadership. When contradictory inferences can be drawn from the evidence, the question should be resolved by the jury and it is not a matter for the consideration of the court on a motion for a JNOV. Given that Dr. Williamson's opinion was well supported by the evidence, we cannot say that the question of price leadership should not have gone to the jury.

The next question is whether the evidence shows that Kaiser deliberately manipulated the coil and pipe prices to create a squeeze. There was evidence that the squeeze was not caused by natural market forces.

The most significant evidence of deliberate manipulation of the coil prices was Kaiser's withdrawal of the commodity price

for coil in January of 1974. This caused a steep rise in the price of coil from about 38 cents per pound to about 44 cents per pound. At approximately the same time, Alcoa and Reynolds raised their coil prices to the same price levels. Dr. Williamson testified that he believed that the price hike was made for "strategic" reasons. Even Kaiser's manager, Holmes Collins, testified that the commodity price was withdrawn because Kaiser no longer wished to sell to independent fabricators. Thus, Collins' testimony supported an inference that the price change was not related to costs but was intended to affect the independent competition.

Perhaps some of the strongest evidence that the price sqeeze was deliberate lies in the relationship of the price of coil charged by Kaiser and its distributor price for pipe. If the coil prices charged by KACSI truly reflected the cost of the coil plus a fair return, then the price of the finished pipe should be higher by at least the fabrication cost of the pipe. However, the price of the pipe was often below the price of the coil during the first six months of 1974. Alternatively, if the price of the pipe reflected Kaiser's true costs plus a fair return, then the price of the raw material should be less by at least the cost of the fabrication. Thus, either the pipe prices were too low, or the raw material prices too high.

Further evidence that the price squeeze was deliberate lay in the transfer price system used by Kaiser. The transfer price is the price that the parent KACC charged its subsidiary KACSI for aluminum. The transfer price was a fixed price per pound that is set once a year and reflects the projected direct costs of producing the aluminum and excludes an allowance for corporate overhead. As such, the transfer price is usually well below the market price. Althouh the transfer price system itself is not evidence of classic predatory behavior, Kaiser's system permitted KACSI to set coil prices for its competitors without affecting its pipe costs. Usually, the market price of the raw materials determines the price of the finished product. In this case, Kaiser could set whatever market price it chose for the raw material, within certain limits, without directly affecting its market price for pipe.

Given these facts, there was sufficient evidence for the jury to conclude that Kaiser not only possessed the power to create the price squeeze, but that it exercised that power to destroy its competition. *See United States v. Alcoa,* 148 F.2d 416 (2d Cir.1945).

There is additional evidence that Kaiser sought to destroy Columbia by setting up Robert Kennedy as a distributor. There is evidence that Kaiser extended credit to Kennedy even though its credit department concluded that Kennedy's operation was an "unacceptable credit risk." App. at 4466. The jury could infer that by going against the very strong recommendation of its credit department, Kaiser displayed its intent to drive Columbia out of business. *See Columbia,* 574 F.2d at 31. *Cf. Greyhound Computer v. IBM,* 559 F.2d 488, 498 (9th Cir.1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 796 (1978) (If a jury concludes that a manufacturer possesses monopoly power, then it would be precluded from otherwise lawful practices that exclude competition). Although Kaiser contends that the credit department did eventually approve of the Kennedy account, the evidence indicates that during the first year, Kaiser extended Kennedy up to at least $78,000 credit secured by no more than Kennedy's $25,000 letter of credit and by a security interest in the accounts receivable, which was not much more than the security earlier evaluated by the credit department as unacceptable. App. at 4466.

Further, contrary to Kaiser's contentions, we do not consider that Kennedy's dismissal as a defendant renders the evidence of Kennedy's activities irrelevant to the monopolization claims against Kaiser. The district court's instructions in this regard were fully consistent with this court's earler opinion. *See Columbia,* 579 F.2d at 31, 36.

When a monopolist competes by denying a source of supply to his competitors, raises his competitor's price for raw materials without affecting his own costs, lowers his price for the finished goods, and threatens his competitors with sustained competition if they do not accede to his anticompetitive designs, then his actions have crossed the shadowy barrier of the Sherman Act. *See* Handler, Some Unresolved Problems of Antitrust, 62

Colum.L.Rev. 930, 934 (1962). Given the evidence of Kaiser's anticompetitive behavior, we hold that there was sufficient evidence to permit the monopolization claim to go to the jury.[3]

V. Contradictory Evidence Presented at the Liability and Damage Trials

Kaiser also contends that a judgment notwithstanding the verdict (JNOV) should have been granted because the plaintiff produced evidence at the trial on damages that contradicted the evidence presented at the liability trial. Kaiser, however, fails to explain the legal theory supporting its contention.

Normally, when the evidence is contradictory, a JNOV is inappropriate. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir.1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). The assumption is that the jury should decide factual issues involving contradictory evidence. In this case, however, no single jury heard all of the allegedly contradictory testimony. Kaiser's argument must be that if a single jury had heard both the evidence on liability and damages, then that jury would not have returned a verdict against Kaiser. Under this theory, however, a JNOV is not the proper remedy in this case. There was sufficient evidence of monopolization to go to the jury, even if, as Kaiser contends, the plaintiffs' introduced evidence that was inconsistent with their theory of liability.

The proper remedy, at best, would be a new trial on both liability and damages. Kaiser, however, does not argue for a new trial on the ground that testimony inconsistent with the theory of liability was introduced at the damages trial.

Even if we were to construe Kaiser's arguments for a JNOV as a request for a new trial in the alternative, we do not believe that substantial justice dictates that a new trial be ordered. *Cf. Scott v. Plante*, 641 F.2d 117, 136 (3d Cir.1981),

3. Kaiser does not contend on this appeal that there was insufficient evidence as to any issues, such as specific intent to monopolize or a dangerous probability of achieving monopoly power, that relate solely to the attempt to monopolize claim. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir.1975).

vacated on other grounds, 458 U.S. 1101, 102 S.Ct. 3474, 73 L.Ed.2d 1362 (1982). If the district court committed error, it would have been in its failure to order a full new trial in 1981 when it ordered the limited retrial on damages. In general, the ordering of a new trial is committed to the sound discretion of the district court. In this case, we cannot say that the district abused its discretion. The liability trial was properly conducted and there was no need to expend further judicial resources retrying liability.

In some situations, however, the seventh amendment right to a jury trial is implicated if the issues in the separate retrial on damages are so interwoven with the issues of liability already tried that it is unjust to try the damages separately. *Gasoline Prods. Co. v. Champlin*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931). In this case, it might be argued that the issues are interwoven if the theory of damages relied upon was inconsistent with the liability theory, thus requiring a single jury to resolve the inconsistency. We believe, however, that the issues are not interwoven because the theory of damages was consistent with the theory of liability.

Kaiser claims that Dr. Bowman, the plaintiffs' expert witness at the damages trial, contradicted the theory that the price squeeze was deliberately caused by Kaiser and not the result of natural market forces. First, Dr. Bowman testified that he could estimate a free market price for pipe by using the price of coil as a base figure and then adding to the coil price a certain percentage of the base figure to account for fabrication costs and a reasonable profit. In choosing a base figure, Dr. Bowman used the actual coil prices charged by Alcoa and Reynolds from 1973 to 1977. Thus, Kaiser charges, the implication of Dr. Bowman's testimony is that the coil prices would have been the same in a free market. However, the theory of liability was not that the prices of the raw materials were too high, but that Kaiser deliberately caused a price squeeze condition. The jury did not find that there was a price conspiracy among Kaiser, Alcoa, and Reynolds. The plaintiff was entitled to show that in a free market, either the pipe prices would have been higher or the raw material prices lower during the period of the price

squeeze. In constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative. *See Litton Systems v. American Telephone and Telegraph Co.*, 700 F.2d 785, 822-23 (2d Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). Dr. Bowman anchored his theory to the actual prices of coil over a five year period. If he had constructed a hypothetical price for coil to calculate a hypothetical price for pipe, his theory would have been far more speculative. Under present circumstances, we do not believe that the implications of Dr. Bowman's testimony were so inconsistent with the plaintiffs' theory of liability as to warrant a new trial.

The second set of statements that Kaiser alleges contradicts and disproves the price squeeze theory was a statement by Dr. Bowman that the free market price of pipe from 1973 to 1977 would have been "substantially similar" to the actual prices for pipe charged by Kaiser. Dr. Bowman, however, testified also that actual pipe prices were "depressed" and "tended to be lower" than his hypothetical free market pipe prices. App. at 6520 and 6531. If actual pipe prices were lower than the hypothetical prices, then his testimony was consistent with the liability theory. The only inconsistency is that Dr. Bowman appeared to contradict himself when he testified that the prices were "substantially similar."

Dr. Bowman's statements are not necessarily inconsistent. His statements applied to a five year period of time. Pipe prices may have been fair over a five year period and still have been depressed during the shorter time period involved in the price squeeze. Further, even if Dr. Bowman's testimony was internally inconsistent, it was an inconsistency entirely before the damages jury. Dr. Bowman's credibility was properly before the damages jury and is not grounds for a new trial.

VI. Bifurcation of Trial on Liability and Damages

Kaiser next argues that because the liability jury did not distinguish among the alleged anticompetitive acts in its determination of causation, the damages jury could not know

from what acts they could attribute damages. Thus, Kaiser contends, the issues on liability could not be separated from the issues on damages. We believe that Kaiser has confused the questions of causation and calculation of damages. Causation is an element of liability in this case. *See REA v. Ford Motor Co.*, 560 F.2d 554, 557 (3d Cir.), *cert. denied*, 434 U.S. 923, 98 S.Ct. 401, 54 L.Ed.2d 281 (1977). The liability jury properly found causation from only those acts which could evince the defendants' willful acquisition or maintenance of a monopoly. *See Brunswick Corp. v. Pueblo Bowling Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In finding causation, the jury must find the nexus between the act and the injury. Once a jury has properly found causation of antitrust injury from unlawful activity, however, the damages in this case may be determined without strict proof of what caused which injury as long as the damages are not based upon speculation or guesswork. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

Here, this result follows because it would be extremely difficult, if not impossible, to segregate and attribute a fixed amount of damages to any one act. The plaintiffs' basic injury was that Columbia was driven out of business. Further, the theory of the section two violation here is not that any one act in itself is unlawful, but that all the acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business. When the antitrust injury is of an indivisible nature, the courts have permitted a relaxed standard of proof in calculating damages. *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 565-67, 101 S.Ct. 1923, 1929-30, 68 L.Ed.2d 442 (1981); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). When the antitrust injury is of an indivisible nature, and the jury properly found that that injury caused by the defendants' monopolization or attempt to monopolize, and when the plaintiffs' proof of damages does not require distinguishing the various acts by the defendants, then it is unnecessary to segregate the damages according to the specific

causes, and therefore, the issues in the liability trial are not so interwoven with the issues in the damages trial as to require a retrial of both.

VII. Prejudicial Conduct During the Damages Trial

Kaiser contends that the conduct of the damages trial was prejudicial to Kaiser because the jury was informed about some of the anticompetitive acts alleged by the plaintiff. It is of course necessary, when conducting a bifurcated trial before two juries, to inform the second jury about some of the evidence and results of the first trial. *MCI v. American Tel. & Tel. Co.*, 708 F.2d at 1168. This is not to say that the second jury was to evaluate or decide factual issues that were involved in the first trial. In this case, antitrust matters are extremely complex, and it would have been unfair not to give the jury some background material on the trial. Questions of trial conduct are committed to the discretion of the trial court. The trial court attempted to conscientiously balance the need of the jury to know about the case and prejudice to the defendant. We believe that the district court acted in an exemplary manner in its conduct of an extremely long and complicated trial and did not abuse its discretion in permitting the jury to hear some explanation of the finding of liability.

Kaiser also contends that plaintiffs' counsel repeatedly flouted the district court's rules and referred to prejudicial matters. The district court, after reviewing the entire record, concluded that it was not sufficiently prejudicial to warrant a new trial. We find no abuse of discretion. *See Pitchford v. Pepi*, 531 F.2d 92, 106 (3d Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 387 (1976).

VIII. The Calculation of Damages

With respect to the separate trial on damages, Kaiser raises several issues. First, Kaiser contends that its motion for JNOV should have been granted because the projected market share analysis used for plaintiffs' calculation of lost profits failed to account for competition by other independent pipe fabricators.

Kaiser further contends that the failure of an expert to account for significant factors in his analysis was an error of law and subject to plenary review in this court. Presumably, Kaiser must be suggesting that the testimony of plaintiffs' expert is inadmissible because it is unsupported; and if it were struck, then the remaining evidence would be insufficient to support the damages verdict and Kaiser would be entitled to a JNOV.

We note that Kaiser neither raised this issue specifically in a motion for a directed verdict, nor did it object to the jury instructions on this matter. Thus, Kaiser is not entitled to a JNOV, nor may it raise this issue on appeal as an error of law. *See infra Section IX*, Fed.R.Civ.P. 50(b), 51; *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984); *Herman v. Hess Oil*, 524 F.2d 767 (3d Cir. 1975).

Even if, however, we were to construe Kaiser's motion for a directed verdict to have raised this question, we would not hold that the JNOV should have been granted. The testimony of Dr. Bowman made clear that he was aware of, and accounted for the presence of other aluminum pipe fabricators. His testimony was supported, and therefore, admissible. At best, Kaiser's contentions go to the weight of the evidence and not its admissibility. That, however, was for the jury. *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 108-09 (3d Cir. 1976).

As to Kaiser's remaining contentions on damages, we have examined the record and conclude that the district court did not err in allowing damages for both lost profits and actual losses; nor did the district court err in failing to instruct the jury on plaintiffs' duty to mitigate damages; nor did the district court err in permitting the jury to consider damages for lost profits on projected sales outside of the geographic and product markets stipulated for liability purposes.

IX. The Plaintiffs' Appeal

The district court granted, in part, Kaiser's motion for JNOV as to one aspect of damages. It eliminated the jury award for diminution of going concern value as inappropriate as a

matter of law when Columbia had not literally gone out of business as of the date used in the damage calculation.

The plaintiffs contend on their appeal that a grant of a JNOV was improper when Kaiser failed to assert this ground in its motion for a directed verdict at the close of the evidence. *See* Fed.R.Civ.P. 50(b). Kaiser made an oral motion for a directed verdict at the conclusion of all the evidence on damages. Kaiser specifically asserted three grounds for a directed verdict: (1) the evidence failed to show that Columbia was injured by Kaiser; (2) the damage calculations included projected sales outside of the stipulated geographic market; and (3) there was insufficient evidence of a price squeeze. Kaiser never raised in its motion for a directed verdict the contention that damages based on a diminution of going concern value may not be awarded in this case.

The specific grounds for a JNOV must be asserted in the motion for a directed verdict. *Abraham v. Pekarski,* 728 F.2d 167, 172 (3d Cir.), *cert. denied,* ____ U.S. ____, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984). If the issue was not raised in the motion for the directed verdict at the close of all the evidence, it is improper to grant the JNOV on that issue. *Id. See also Mallick v. IBEW,* 644 F.2d 228, 233-34 (3d Cir.1981); *Systemized of New England, Inc. v. SCM, Inc.,* 732 F.2d 1030, 1035-36 (1st Cir.1984); *U.S. Industries, Inc. v. Blake Const. Co., Inc.,* 671 F.2d 539, 548 (D.C.Cir.1982).

The requirement that the specific issue be raised first in the motion for a directed verdict, before the issue is submitted to the jury, affords the non-moving party an opportunity to reopen its case and present additional evidence. *Lowenstein v. Pepsi-Cola Bottling Co.,* 536 F.2d 9, 11 (3d Cir.); *cert. denied,* 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976). Further, when a trial court decides an issue after it was properly submitted to the jury, it may deprive the non-moving party of his seventh amendment rights. *Id.*

In this case, Kaiser contends that it raised the issue in a colloquoy with the district court concerning jury instructions. A request for jury instrucitons may suffice to fulfill the requirement that a motion for a directed verdict be made before

granting a JNOV only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such. *Mallick,* 644 F.2d at 234; *Lowenstein,* 536 F.2d at 11. We have studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice that after all the evidence had been presented Kaiser was raising an issue as to whether damages for diminution of going concern value could be awarded. The record shows that Kaiser only objected to the wording of a jury instruction and agreed that the instruction on diminution of going concern value could be submitted to the jury after it was reworded. App. at 7529-31.

Finally, even if, contrary to our conclusion, we were to assume that Kaiser had properly raised the issue in its motion for a directed verdict, it was error for the district court to have ruled for the defendants on this aspect of the motion for a JNOV. The plaintiffs' theory at trial was that damages for diminution of going concern value could be awarded as of the date that Columbia had effectively gone out of business. The plaintiffs argued to the district court that Columbia had ceased manufacturing operations prior to May 31,1977 and would have gone out of business by that date because of Kaiser's anticompetitive activities if Columbia had not received an Economic Development Administration loan from the United States Department of Commerce. The loan permitted Columbia to continue operations for a few months before it ultimately went out of business and liquidated its assets. The plaintiffs presented evidence to support their theory and the jury was instructed, without objection, as to the plaintiffs' theory.

Kaiser neither submitted contrary jury instructions, nor did it object to the jury instructions as required by Fed.R.Civ.P. 51. The district court also specifically asked counsel for Kaiser whether he objected to the plaintiffs' legal basis for seeking damages for diminution of going concern value, and Kaiser's

counsel raised no objection to the submission of the issue to the jury. App. at 7529-7531.[4]

By granting Kaiser's motion for JNOV, the district court effectively repudiated its own jury instructions even though Kaiser had not challenged the legality of the plaintiffs' damages theory. Having properly submitted the issue to the jury, it was error to rule on a JNOV that the plaintiffs, as a matter of law, could not recover for diminution of going concern value on the ground that Columbia had not actually liquidated on the date used for the damages calculation.

We conclude that Kaiser failed to preserve for JNOV consideration the ground relied upon by the district court to grant the JNOV, and that the district court incorrectly decided that the jury determination was erroneous. To the extent that the district court's order granted the motion for a JNOV, it will be reversed.

X. Conclusion

The order of the district court granting in part the defendant's motion for a JNOV will be reversed. The judgment entered by the district court on January 18, 1983 will be vacated and the judgment entered on December 4, 1981 will be reinstated, and that judgment will be affirmed.

Statement of ADAMS, Circuit Judge, sur denial of the petition for rehearing in banc.

I respectfully dissent from the order denying rehearing in banc, because I believe that this case raises a number of issues of sufficient import to command the attention of the entire Court.

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4. For example, the plaintiffs submitted a proposed jury instruction which stated, *inter alia*, "An antitrust plaintiff may recover both lost profits and the value of the business as a going concern as of the date the business terminated or made effectively dormant by the actions of defendants." App. at 5601. Kaiser's counsel, when asked by the district court if he had any objections to the instruction replied, "I don't really have an objection to the description of what the plaintiff is seeking to do here, your Honor. It is just the way this is phrased. It is not really an objection to the concept of the charge." App. at 7531.

First, I believe there is a serious question whether Kaiser's contentions regarding the applicability of the Supreme Court's recent decision in *Copperweld Corp. v. Independent Tube Co.*, ____ U.S. ____, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), have been properly answered. Copperweld, handed down after the trial but before the decision of the panel, holds that a parent and a wholly-owned subsidiary are not considered separate entities for purposes of a conspiracy charge under section 1 of the Sherman Act, 15 U.S.C. §1. If there can be no intra-enterprise conspiracy under section 1 of the Sherman Act, Kaiser asserts that logic dictates a similar result under section 2 of the Sherman Act. If Kaiser is correct, then the propriety of the jury's verdict which relied in part on such a conspiracy is called into question.

Second, the bifurcation of the trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). This Court has recently recognized the continued vitality of *Gasoline Products*—that retrial of only one issue in a case, such as liability, is not proper unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500, 51 S.Ct. at 515. In *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576 (3d Cir.1983), this Court emphasized the danger of separate trials on damages and liability, particularly when there is evidence, as here, that the first jury reached a compromise verdict. This is illustrated by the fact that the first jury here returned a damage verdict of $5,445,000 when trebled and the second jury returned a verdict of $9,567,939 when trebled.

Finally, the substantial expansion of the "price squeeze" theory of liability also merits attention. Kaiser has been found guilty of utilizing an unlawful price squeeze even though during the years in question plaintiff was purchasing its raw materials from Alcoa and Reynolds, rather than from the defendant. One essential element of a price squeeze is monopoly power in the raw material. *See United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). Therefore, it appears to

be a significant extension of the price squeeze doctrine to predicate antitrust liability on such a basis in a case in which the defendant is not selling the raw material in question to the plaintiff and there is no evidence of any conspiracy between defendant and the other suppliers of the raw material.

Each of these important issues would appear to warrant further attention by the entire Court.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

Sally Mrvos
Clerk

Mr. Michael E. Kunz, Clerk
U.S. District Court
Eastern District of PA
2609 U.S. Courthouse
Phila., PA 19106

July 1, 1986

Re: Bonjorno, Joseph A., etc., et al. Appellants in No. 83-1047 vs. Kaiser Aluminum & Chemical Corporation, etc., etc., Appellants in No. 83-1079
(D.C. Civ. 74-122)

Dear Clerk:

Enclosed is a certified copy of the judgment in the above-entitled case(s), together with copy of the opinion. The certified judgment is issued in lieu of a formal mandate and is to be treated in all respe cts as a mandate.

( ) We return herewith the certified record in the case(s).

(x) We release herewith the certified list in lieu of the record.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

/s/
Chief Deputy Clerk
Direct Dial 597-3135

sa
Enclosure
cc: Michael M. Baylson, Esq.
Richard P. McElroy, Esq.

P.S. To the Clerk of the District Court Also enclosed are the following:

1. Certified copy of the Order dated July 1, 1986
2. Certified copy of Stipulation.

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 83-1047 & 83-1079

BONJORNO, JOSEPH A., KERR, GEORGE M.,
and CLISBY, BARBARA K., as Transferrees
in Liquidation and Dissolution of
Columbia Metal Culvert Co., Inc.,
Appellants and Cross-Appellees

vs.

KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.
ROBERT A. KENNEDY and
KENNEDY CULVERT & SUPPLY COMPANY and
ROBERT KENNEDY
Kaiser Aluminum & Chemical Corporation and Kaiser
Aluminum & Chemical Sales, Inc., *Appellees and Cross-Appellants*

(D.C. Civil No. 74-0122)
ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered January 18, 1983, which granted in part the defendant's motion for a judgment n.o.v. be and the same is hereby reversed. It is further ordered and adjudged that the judgment of the said District Court entered January 18, 1983, be and the same is hereby vacated and the cause remanded to the said District Court which is directed to reinstate the judgment entered December 4, 1981, which is affirmed. Costs taxed in

favor of appellants and cross-appellees. All the above in accordance with the opinion of this Court.

ATTEST

/s/ Sally Mrvos
Clerk

December 27, 1984

Nos. 83-1047 & 83-1079

Certified as a true copy and issued in lieu of a formal mandate on July 1, 1986.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of aplt./crs. appee as follows:

Briefs and Appendix $3,120.00

INTEREST ON JUDGMENTS IN FEDERAL LITIGATION

28 U.S.C. §1961

Curtis R. Reitz
Algernon Sydney Biddle Professor of Law
University of Pennsylvania

October 1986

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INTRODUCTION

The purpose of this paper is to explore the law and the rationale for the law regarding awards of interest on judgments for money in federal litigation. I have been studying developments in the law of interest recovery for some time. At the request of counsel for plaintiffs in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, No. 74-122, now pending in the United States District Court for the Eastern District of Pennsylvania, I undertook to present, in this paper, the results of my study as they apply to interest on judgments under federal law.[1] Although I have been retained as a consultant, the views expressed are entirely my own.

Much recent ferment has occurred in the law regarding interest on judgments, a subject once marked by stolid inertia and lack of significant controversy. Present federal law regarding interest on judgments is in a state of disarray. The law has developed in a fragmentary way which has tended to obscure the policies animating awards of judgment interest to successful litigants. However, an examination of existing law in light of these fundamental policies reveals a consistent, coherent, and principled approach to issues of interest on judgments in cases of varying procedural complexity.

The primary purpose of interest on judgments is to accomplish the restitutionary goal that neither party to litigation shall obtain benefits or suffer losses because of the time required for litigation to run its course. The elementary economic fact is that money has time-value. The time value of money associated with periods of litigation inures to the benefit of defendants. Plaintiffs incur reciprocal losses. A fundamental legal policy of long-standing duration held that judgment debtors should be required to surrender the benefits derived from delay in performance of their monetary obligations and that these sums should be awarded to plaintiffs. Effectuation of that public policy became more important and more complex as the time value of money soared in the past fifteen years.

---

1. In the ongoing study, I have been considering pre-judgment interest and interest on judgments in state and federal law.

In the past, the law assessed the cost of delays between verdict and payment by reference to "legal" rates of interest, representing the highest non-usurious rates applicable to marketplace transactions. A remedy so measured adequately compensated successful parties for litigation delays in an era of low, stable interest rates. However, in the present climate of high interest rates, low rates of interest deny successful litigants full compensation and encourage unsuccessful parties to prolong the period between verdict and payment of damages.

The current federal statute governing awards of interest on judgments, 28 U.S.C. §1961, allows judgment interest at rates of interest found in the marketplace. This statute, amended in 1982, was intended to provide more adequately for compensation to successful litigants. Its proper application depends upon principled analysis of three questions:

1. In extended litigation, what judgment determines that interest is properly allowable (*i.e.*, what event in the litigation triggers the "vesting" of what previously was only an "inchoate" right)?
2. For what period of time is interest to be allowed?
3. What is the rate at which interest is to be awarded?

As to the first question, interpretation of §1961 and a related procedural rule (FED. R. APP. P. 37) demonstrates that interest becomes properly awardable on the issuance of that judgment which concludes the litigation on the merits. Until such a judgment is rendered, a litigant is invested with no right to recovery and hence no right to receive compensation for the time value of his award. Entry of the ultimate judgment appropriately determines the law under which a litigant's rights to interest are measured.

With respect to the issue of the period over which interest is awardable, the statute and applicable precedent demonstrate that an award of interest may (and frequently does) antedate the judgment in which a successful litigant's right to interest is established. To fully effect the restitution function of interest on judgments, such interest begins to accrue from that point where the amount of a litigant's damages has been fixed and is no longer subject to any adjustment for time value of money.

Finally, on the issue of the proper rate at which interest on judgments is awarded, 28 U.S.C. §1961 contemplates that a court refer to the Treasury bill rate in effect at the time interest begins to accrue. The rate thus determined applies to all interest due the successful litigant, and interest is compounded annually. The present version of 28 U.S.C. §1961 became effective on October 1, 1982. Conflict has arisen over how that statute applies to litigation under way on the effective date of the statute and concluded thereafter. Sound policy considerations and precedent support application of the current statute to judgments entered after October 1, 1982, even though part of the proper period of interest accrual came before that date.

I. TIME VALUE OF MONEY, INCONSTANT DOLLARS, AND THE LAW

A. Introduction

The primary judicial remedy in the Anglo-American legal system is the money judgment. Prevailing plaintiffs in actions for this remedy establish that a cause of action ripened on a date before the commencement of litigation. Typically, the basic amount fixed in a money judgment is the amount due as of the time that the cause of action ripened. Litigation is inevitably time consuming. The date when the litigation process establishes the amount of money due will be later, and sometimes will be very substantially later, than the date on which the cause of action ripened. Much further delay is likely before the litigation process concludes and the judgment can be executed. A major corollary branch of the law of remedies takes into account the effect, on the relief to be granted, of the lapse of time between the date that a legal obligation ripened and the date on which that obligation is finally met.

Transformation of a matured claim for monetary relief to a specific sum of money paid in satisfaction of adjudicated liability, given the time requirements, poses a fundamental policy question: how shall the economic consequences resulting from passage of time consumed by litigation be distributed between the parties? The overall answer has been to adjust the amount to

be paid on payment day in accordance with the basic tenets of restitution, the most elementary principle of the law of remedies. Any obligor benefits from delay in performing the obligation to pay a sum of money. Defendants necessarily receive the benefits of delay. Conversely, plaintiffs suffer loss from delay in receiving sums of money. Sound policy regarding distribution of economic consequences has been to require defendants to surrender benefits received and to compensate plaintiffs for losses incurred by the delay in obtaining money due.

During the past two centuries, the law developed, in piecemeal fashion, to vindicate the policy judgment that defendants should disgorge to plaintiffs benefits obtained by delay in payments. Complementary bodies of law emerged to adjust the nominal amounts of plaintiffs' claims in accordance with the restitution objective. One adjustment occurs in the fact-finding function, which attempts to fix the amount of the money to be recovered in values current at that time. The primary method for doing so is the inclusion of so-called pre-judgment interest in a fact-finder's statement of the amount then due. The second adjustment centers on the time, after the fact-finding function has closed, until a defendant ultimately satisfies a judgment by payment. This adjustment adds interest on the principal sum of the fact-finder's determination. This secondary adjustment is dealt with under the law of interest on judgments, sometimes called post-judgment interest.

The fragmentary nature of the legal developments and their interpretation obscures at times the clear and compelling policy that underlies the network of remedial doctrines. The pattern consists partially of common law, created case-by-case over time by courts deciding specific controversies. Other parts of the larger scheme are statutory. Proper application of any part of the laws in this area is made more understandable by placing any specific question in the context of the larger purposes and policies of the law.

Historically, legal documents occurred within a general sense of the restitutionary principle, but without overt recognition of how a particular remedy fitted into a larger scheme. Past failures to focus on the issues more comprehensively may be

explained in part by the relatively minor amounts at stake in transforming past values of monetary obligations to present value. The principal sums in question in litigated cases were the predominant concern. In more recent years, that relationship has changed dramatically. The adjustments necessary to take into account the consequences of passage of time on the value of a sum of money have become one of the most important aspects of remedial law. More than ever before, the need is manifest to see comprehensively the framework for the questions presented and to handle intelligently the application of statutory and common-law rules in particular controversies.

Before considering these legal developments, it is useful to review the fundamental economic forces that determine the time value of money and the extraordinary scale of recent changes in that value in the marketplace. The sharp rise in the time value of money in the "real world" etches new importance on judicial remedies intended to take account of the time value of money.

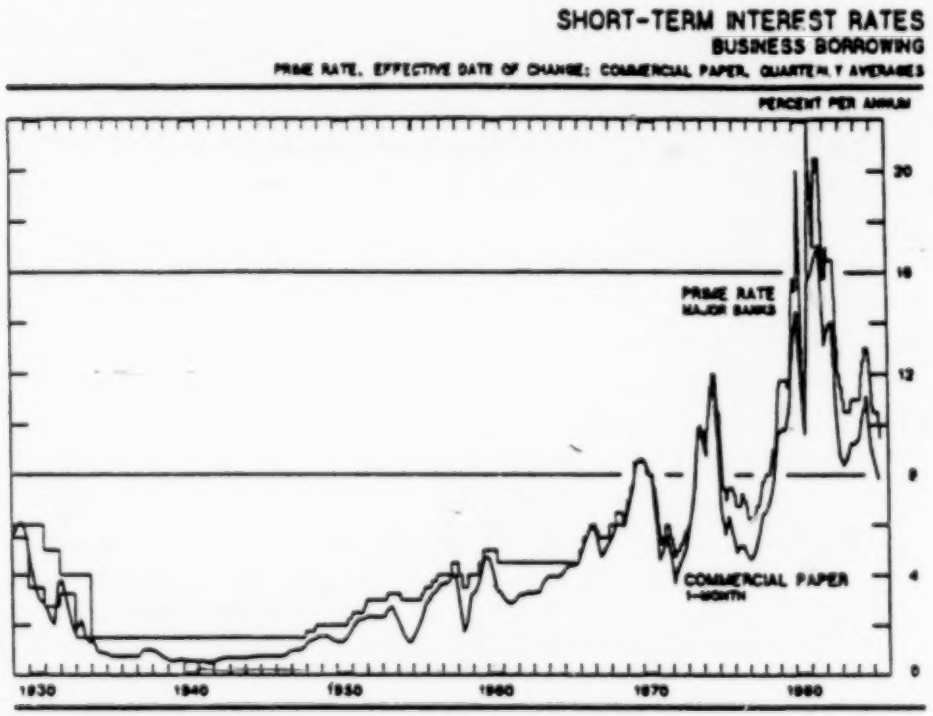
B. A Look at the Marketplace

During the last decade and a half, the time value of money in the marketplace soared to unprecedented high levels. Time value of money is reflected in the various rates of interest charged by lenders and paid by borrowers in voluntary transactions. High interest rates continue to be a major concern on the governmental agendas of the President, the Congress, and the Federal Reserve Board. Current sluggishness in growth of the United States economy is widely attributed to this factor. High interest rates vitally affect businesses and individuals in their use of credit. Despite the recent success in controlling inflation, real interest rates remain extremely high relative to the experience of the past.

The history of two common credit transactions, involving short-term borrowing by business entities, reveals the precipitousness of the recent rise in the time value of money. Lending institutions charge their customers varying rates of interest on short-term line-of-credit loans. The so-called prime rate is that

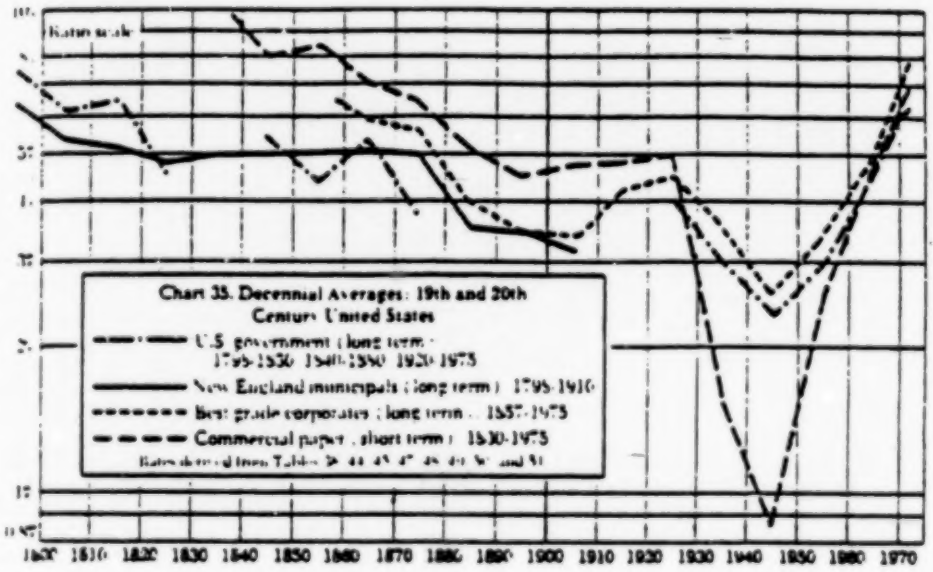
used by a bank with its most creditworthy business borrowers, usually major corporations. Prime rates serve as a basic yardstick for determining rates for less creditworthy business borrowers, who are charged and pay a stipulated number of "points over prime." Business entities also borrow by selling commercial paper, loans of a fixed but short-term duration. The rate of interest paid in commercial paper transactions is another indicator of time value of money. Aggregate data on prime rates and commercial paper rates are collected, averaged and published to show changes in time value of money over periods of time.

The following chart, published by the Federal Reserve Board, shows the levels and the movement of prime rates and commercial paper rates since 1930. The extraordinary peaks in the late 1970's and early 1980's reflect an economic cataclysm that still wracks the economy.



Source: Federal Reserve Board, 1985 Historical Chartbook 99

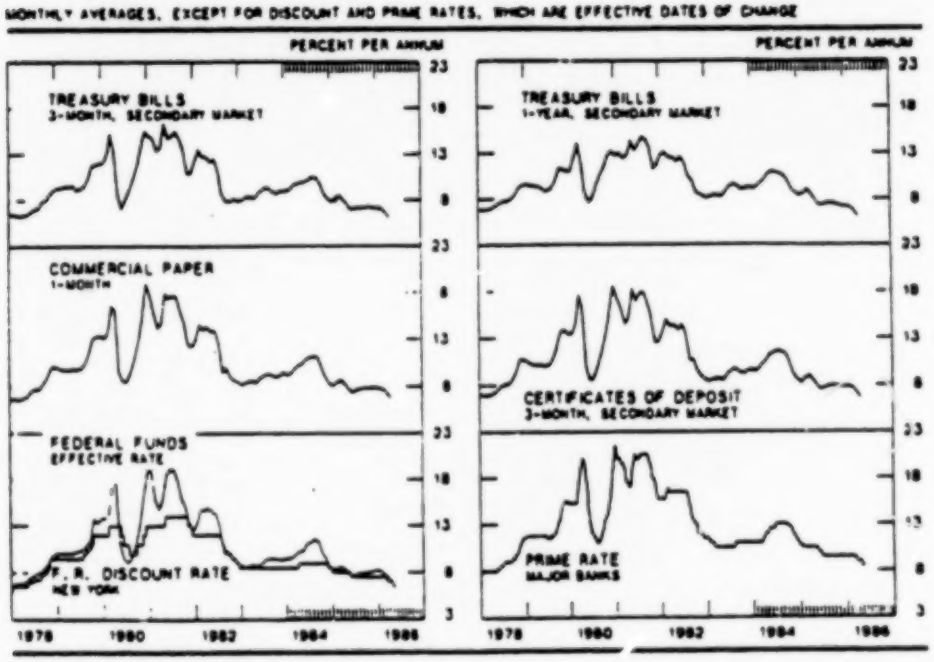
The general pattern of rates evident in the Federal Reserve Board's Historical Chartbook has been traced back well before 1930. The authoritative historian of interest rates, Winslow Homer, compiled the following 200-year chart of rates on a number of long-term and short-term credit transactions, including short-term commercial paper from 1830 to 1975.[2]



2. *See* W. Homer, A History of Interest Rates 339 (2d ed. 1977).

For the most recent decade, the Federal Reserve Board publishes monthly a more detailed chart of interest rates, showing the major banks' prime rates and the rates on commercial paper, together with rates applicable to certificates of deposit (borrowing by banks) and three federal credit transactions.

SHORT-TERM INTEREST RATES



Source: Federal Reserve Board, Chartbook 72 (May 1986).

The data reported on nominal interest rates reflect the time value of money at the dates indicated and the changes in the time value of money from time to time. It should be evident that the changes reported, particularly the extreme heights experienced in the past fifteen years, represent a reaction in part to the shrinking purchasing power of a dollar. If, due to price inflation, the purchasing power of a dollar is declining, the time value of money takes into account that debts will be paid in dollars worth less than the dollars borrowed. The decline in the purchasing

power of a dollar with respect to purchases by business entities is reported in the following table:

PURCHASING POWER OF THE DOLLAR: 1940-1986

(Obtained by dividing the average producer prices index for the 1967 base period ($1.00) by the producer prices index for a given period.)

1948	$1.252	1967	1.000
1949	1.289	1968	.972
1950	1.266	1969	.938
1951	1.156	1970	.907
1952	1.163	1971	.880
1953	1.175	1972	.853
1954	1.172	1973	.782
1955	1.170	1974	.678
1956	1.138	1975	.612
1957	1.098	1976	.586
1958	1.073	1977	.550
1959	1.075	1978	.510
1960	1.067	1979	.459
1961	1.067	1980	.405
1962	1.064	1981	.371
1963	1.067	1982	.356
1964	1.063	1983	.351
1965	1.045	1984	.343
1966	1.012	1985	.340

Source: Statistical Abstract of the United States 1986; Survey of Current Business (March 1986).

This table shows, for example, that a payment of $100 in 1985 to satisfy the principal of a $100 obligation incurred in 1967 would mean that, in real value, a $34 payment satisfied the $100 debt. The marketplace does not allow such a phenomenon to occur. Nominal rates of interest adjust so that a creditor receives, in more or less constant dollars, both the principal of

the debt and a return for the use of the money by the debtor during the credit period.

Marketplace rates of interest are the proper source to consider in measuring the judicial remedies that take into account the time value of money. The restitution principle that calls for defendants to give up benefits received by delays in performance of monetary obligations refers to benefits obtained or obtainable in the marketplace. Likewise plaintiffs' losses, suffered by reason of delays in the performance of monetary obligations, are losses measured basically by marketplace costs. Delay in performance of a monetary obligation is, in a real sense, an involuntary loan by plaintiff to defendant. Marketplace indicators of the time value of money provide, therefore, the best source for determining the legal measure of recovery for these involuntary loans.

C. Legal Remedies for Time Lapse: An Overview

Remedial law takes account of the reality that money has time value at two key points in the unfolding of litigated cases. The first usually occurs at the end of the fact-finding process when the dollar value of a plaintiff's claim is fixed by verdict or court finding. The second occurs when a defendant pays a final judgment. At these two points, and only at these points, recognition is given to the time value of a sum of money.

In litigation that results in a money judgment, one fact-finding goal is to express the amount of a plaintiff's claims in terms of present value. The gravamen of plaintiffs' claims tend to be losses incurred, obligations dishonored, or rights invaded at an earlier time. Typically, fact-finders measure the value of those claims as of the time they ripened and, as a corollary remedy, add an additional amount to adjust for the time value of money from the historical events to the dates of decision. The added amounts of the corollary remedy for time value of money are commonly called pre-judgment interest. More accurately,

that corollary remedy would be designated as pre-verdict or pre-finding interest.[3]

Litigation does not end with a jury verdict or court finding that determines the amount a defendant then owes to a plaintiff. In theory, a defendant might promptly pay the specified amount, but litigation runs its course to judgment. In jury trials, the post-verdict stage of further proceedings in the trial court may be extensive: consideration of motions for new trial, motions for judgment notwithstanding the verdict, and more. Bench trials, too, may involve additional proceedings prior to final judgment in the trial court. Moreover, frequently, trial court judgments are appealed, with sometimes more than one level of appellate review. Post-verdict or post-finding proceedings may take years, during which time the amount determined to be due by the fact-finder usually remains unpaid. Ultimately, final trial court judgments are entered after all issues have been revolved.

When defendants eventually pay these final judgments (or when the judgments are executed), the second adjustment is made to take account of the time value of the money defendants are legally obligated to pay plaintiffs. Starting with the amount

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3. In the past, courts generally declined to award pre-judgment interest in cases where the amount of a plaintiff's principal claim was uncertain prior to verdict or court-finding. The rationale usually given was the supposed unfairness to a defendant who could not stop the accrual of interest liability by payment into court of the contested amount or by some comparable pre-verdict act. This rationale is not valid. A defendant, concerned with the risk of accrual of interest, could pay into court the amount defendant believed to be involved. *See, e.g.* FED. R. CIV. P. 67. More fundamentally, lack of certainty as to the amount of the verdict or finding during the pendency of a claim does not diminish the plaintiff's reciprocal loss.

The historic reticence of courts to allow pre-verdict or pre-finding interest on claims uncertain in principal amount is rapidly disappearing. The effect of refusing a corollary remedy for the time value of money had its greatest impact in personal injury/property damage tort cases. Increasingly, courts now declare that tort plaintiffs are entitled to pre-verdict or pre-finding interest. *See, e.g.*, PA. R. CIV. P. 238.

Further discussion of this issue in the context of interest on judgments appears in the text at notes 34 to 36.

fixed by the fact-finder as the principal sum, remedial law adds interest on the judgment, commonly called post-judgment interest.

The second decision point for taking into account time value of money differs from the first in that, ordinarily, no institutional fact-finder like a jury or trial court is available to act. Interest on judgments is usually calculated by the parties and confirmed by court clerks' decisions to mark judgments "satisfied." The parties and clerks are guided by standard interest calculation formulae established by law.

For interest on judgments, the legal remedy developed to take account of the time value of money uses a standardized measure of the amount of recovery rather than a case-by-case inquiry into the provable benefits derived by a defendant or the provable loss suffered by a plaintiff. The solution has been a statutorily set rate of interest that applies to judgments generally.[4]

Historically, the rates of interest adopted by statutes were the highest rates permitted by usury laws in consensual transactions, often called "legal rates" of interest. As a result, the restitution remedy in the past was generous in relation to marketplace rates.[5] "Legal rates" tended to be 6% or higher, a

4. Pre-judgment interest is taken into account before the fact-finding process has closed, but even here there was a tendency to use a standardized measure of the adjustment required to take account of the time value of money. *See, e.g.*, U.C.C. §3-122(4); RESTATEMENT (SECOND) OF CONTRACTS §354 & comment a (1981). After market rates of interest had escalated to extraordinary levels, plaintiffs began to introduce evidence of their losses as part of the injuries for which they sought relief. Courts then faced the somewhat novel question of having to choose between the traditional standard measures of relief and the measures indicated by vivid losses suffered by plaintiffs. *See, e.g.*, Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co., 697 F.2d 481 (2d Cir. 1983). *See also* Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUSINESS LAWYER 129 (1983).

5. When pre-judgment interest was set by marketplace measures, the result was a substantial step-up in the applicable rate of interest when the period of pre-judgment interest ended and the period of interest on a judgment began. *See, e.g.*, Chemical Bank & Trust Co. v. Prudence-Bonds Corp., 213 F.2d 443 (2d Cir. 1954). For a time, when marketplace rates had moved far above statutory rates, a substantial step-down in the applicable rate of interest occurred. *See, e.g.*, Peterson v. Crown Financial Corp., 553 F. Supp. 114 (E.D. Pa. 1982) (pre-judgment rate fixed at 2½% above the prime rate of interest).

rate substantially above those tracked by Professor Homer in his historical study of interest rates in voluntary transactions. The legislative choice for most of the history of interest on judgments was to use a standardized measure of the restitution remedy that exceeded rates of interest paid by the most creditworthy businesses in voluntary transactions.

As marketplace circumstances changed and interest rates soared, the statutorily set rates of interest became anachronistic and, indeed, pernicious.[6] During the past decade, virtually every legislature acted to amend its provision for interest on judgments to fix rates of interest on judgments attuned to the changing values of money in the marketplace.

Successful implementation of the restitutionary objective that amounts recovered in litigation should be adjusted for the time value of money, with utilization of current monetary values being applied to effect the adjustments at two points in the litigation, is as illustrated in a recent celebrated federal case.[7]

Years of litigation elapsed as the case moved through the District Court for Delaware, the Court of Appeals for the Third Circuit, and the Supreme Court. Two key decisions, one at the end of the fact-finding stage and one at the time of payment,

6. The dramatic rise in marketplace rates of interest in the 1970s not only moved those rates above the fixed rates used for remedial purposes, but moved them far above. On any rational economic calculus, the benefit of postponement of payment of monetary obligations, subject to low legal rates of interest, would induce defendants to extend litigation to its utmost. The United States Court of Appeals for the Second Circuit took notice of the differential between marketplace interest rates and legal interest rates in sharp rebukes to defendants for pursuing meritless appeals. Bankers Trust Co. v. Publicker Industries, Inc., 641 F.2d 1361, 1367 (2d Cir. 1981); Brady v. Chemical Construction Corp., 740 F.2d 195 (2d Cir. 1984).

7. For reported decisions, *see* Devex Corp. v. General Motors Corp., 494 F. Supp. 1369 (D. Del. 1980), *aff'd*, 667 F.2d 347 (3d Cir. 1981), *aff'd*, 461 U.S. 648 (1983), *on remand*, 569 F. Supp. 1354 (D. Del. 1983), *aff'd*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied sub nom.* Technograph, Inc. v. General Motors Corp., _____ U.S. _____ 106 S. Ct. 68 (1985), *on remand*, Civil Action Nos. 3058 CMW, 83-567 CMW (D. Del. June 27, 1986).

accomplished the remedial purpose. The former brought the historic value of plaintiff's claim to present value as of the initial court finding for plaintiff. The latter carried the value set by the fact-finding decision forward to the date of defendant's payment of the judgment.

The first decision, the fact-finding decision, established in 1980 that General Motors, having infringed plaintiff's patent, owed imputed royalties of $8,813,945.40. The amounts so fixed were historic values, as of the dates of infringing use. The District Court added $10,912,291.15 to reflect the historic value of plaintiff's royalty claim in present values. *Devex Corp. v. General Motors Corp.*, 494 F. Supp. 1369 (D. Del. 1980). The litigation did not end. Proceedings in the Third Circuit and the Supreme Court consumed additional years. The Supreme Court's decision confirmed the District Court's measure of the time value of the money at stake up to the fact-finding decision. After challenges to the District Court's fact-finding decision had been resolved, the amount of General Motors' obligation was increased by the time value of money on the amount found due in 1980 through the date of payment.[8] The District Court accomplished this by adding interest on the judgment. *See Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1022 (3d Cir. 1984). The total recovery on a base claim of $8.81 million, after the two adjustments of the corollary remedy, as $27 million.

The *Devex-General Motors* litigation reflects well the operation of the remedial principle of restitution in an extended

8. The District Court's 1980 finding of the present value of plaintiff's claim was formulated to include a *per diem* amount to be added for each day between the date of the Court's calculation of the amount presently due and the date of entry of judgment in the District Court. This assured that the two periods of adjustment, from claim to findings and from judgment to payment, would meet without gap. *See also* Ashland Oil Inc. v. Phillips Petroleum Co., 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (pre-judgment interest ordered to date of district court's second fact-finding decision, the first having been vacated on appeal; interest on the judgment to begin at that point).

controversy of major proportions. The two, back-to-back adjustments effected the basic goal that the outcome of litigation should be shaped so that neither party gains or loses as a result of the lengthy time period required for cases to reach an end.

II. Federal Remedies for Delay in Reaching Judgment Day

Federal law follows the remedial pattern of adjusting the nominal amount of money recoveries to take account of the time value of money through awards of pre-judgment interest and interest on judgments. The primary concern of this paper is the latter adjustment. As will appear, federal courts grant interest on judgments so that the amount recovered by plaintiffs are adjusted to take into account the time value of money associated with the periods of time required for litigation to run its course. Determinations regarding interest on money judgments cannot be made until all controverted questions on the underlying merits-claims have been resolved. When those determinations are made, in the ultimate controlling judgments, federal courts tend to allow interest on the judgments to accrue from the point in a case history where accrual of pre-judgment interest or other method of time valuation of the amount of recovery ends. In a myriad of procedural settings, the basic result achieved in the *Devex-General Motors* litigation is effected.

A. Pre-Judgment Interest

When fact-finding determinations are made in federal question cases, federal common law provides the standards and criteria to be applied so that those determinations can be expressed appropriately in present value amounts. For some federal question claims, statutes prescribe the addition of pre-judgment interest but no statute broadly addresses pre-judgment interest in federal question litigation.

Private antitrust litigation, for example, has been governed by common-law doctrines regarding pre-judgment interest. Pre-judgment interest was not allowed in treble damage actions

instituted before 1980, but the Clayton Act now allows pre-judgment interest on actual damages if the court finds that defendant or its counsel engaged in dilatory tactics. 15 U.S.C. §15(a) (1982). Interest on the full amount of the trebled damages is recoverable under the law concerning interest on judgments.

B. Interest on Judgments

(1) Statutory and Rule Provisions

A broadly applicable federal statute addresses the recovery of interest on judgments in all federal question cases. The federal statute, found in §1961 of the Judicial Code, is supplemented by a provision of the Federal Rules of Appellate Procedure, Rule 37, which illuminates the nature of the statutory remedy and addresses the relationship of trial and appellate courts in the implementation of the award of interest on judgments.

The statutory provision, 28 U.S.C. §1961 (1982), provides in pertinent part:

§1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

As amended in 1982,[9] this provision responds to the dynamic nature of the time value of money in the marketplace. A flexible rate, ascertainable month by month in accordance with a specified kind of market transaction, assures that rates for interest on judgments reflect changes in time value of money. Congress was very conservative in its choice of the index transaction-type: short-term borrowings by the most creditworthy of all debtors, the United States Government. The Government invariably pays less than other borrowers for the use of money. Section 1961 thus assesses interest on judgments at rates probably below the marketplace rates that would be found in loans to ordinary private business entities.

The statute reflects the marketplace by providing for compounding of interest. Again, the congressional choice was a conservative one. In the marketplace, interest on private loans is compounded at least on a monthly, and often on a daily basis. Under §1961, a judgment fully paid within a year bears only simple interest. Annual compounding thereafter is favorable to judgment debtors.[10]

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9. The Judicial Code provision for interest on judgments can be traced to 1842, when Congress first declared that "interest shall be allowed on all judgments in civil causes." 5 Stat. 518. The 1842 statute indexed the recovery of interest on judgments in federal courts to the rate allowed under the laws of the various states in which the federal courts were located. The original statute was carried forward through various revisions of the Judicial Code. *See, e.g.*, Revised Statutes §966 (1873); 28 U.S.C. §811 (1940). In April 1982, Congress adopted the current version, 28 U.S.C. §1961 (1982). Pub. L. No. 97-164, Title III, §302(a) 96 Stat. 55 (1982).

10. The Director of the Administrative Office of the United States Courts, complying with the instructions in §1961, distributed a series of notices on the enforcement of that section. Copies are attached as an appendix to this paper.

In addition to setting rates of interest on judgments by reference to marketplace rates, the 1982 amendment established a remedy to be applied uniformly across the country. Prior to 1982, federal statutes on judgment interest incorporated by reference rates of interest established by state law in the respective states in which federal courts were located. State legislatures had responded to the precipitous rise in time value of money in different ways and at different times. The sharp divergence of interest rates thereby incorporated into federal law[11] was a major reason for amendment of §1961.[12]

Rule 37 of the Federal Rules of Appellate Procedure, adopted in 1967, elaborates on the remedy declared in §1961. The rule comes into play only when civil cases involving money judgments have been decided by a court of appeals, but the issues of interest on judgments frequently arise in that setting. The rule provides in its entirety:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

A comparable rule is found in the Rules of the Supreme Court, Rule 56.

(2) Federal Remedies As Applied in Cases That Move Promptly to Judgment Day

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11. Within the Third Circuit, for example, Delaware amended its provision for judgment interest in 1980 to set a rate interest 5% over the Federal Reserve discount rate, including any surcharge, as of the time from which interest is due. DEL. CODE ANN. tit. 6, §2301(a) (Supp. 1984). In the *Devex-General Motors* litigation, the judgment interest rate under the formula was 16%. Pennsylvania, on the other hand, allows interest on judgments at the rate of 6%. 41 PA. CONS. STAT. §§201, 202 (Supp. 1986); 42 PA. CONS. STAT. §8101 (1982). The Pennsylvania rate of interest has been unchanged since 1723. *See* Note, *The Post-Judgment Interest Rate in Pennsylvania: Ignoring Reality Too Long*, 23 DUQUESNE L. REV. 1083 (1984).

12. *See* notes 44 and 45 *infra*.

The application of §1961 to an ordinary case, one not complicated by significant delay after the fact-finding decision, is quite straightforward. An appropriate pre-judgment interest award is incorporated into the verdict or finding at the conclusion of the evidentiary hearing. A district court judgment is entered forthwith.[13] The judgment declares formally the amount defendant is obligated to pay. The judgment becomes enforceable by execution after ten days.[14] During that ten-day period, and thereafter until the judgment is paid, interest on the amount of the judgment accrues under §1961.

The remedial scheme is of such clarity on the face of the statute that no additional interpretation is required in cases that follow the simple model. This basic model reveals how the law achieves the underlying remedial objective. The outcome effects the restitutionary purpose of taking account of the time value of money for the period between ripening of a plaintiff's claim and arrival of the day when that claim is paid.

III. APPLICATION OF FEDERAL REMEDIES IN CASES OF EXTENDED DURATION

In much litigation, cases are far from ended when jury verdicts are returned or court findings are made. As the course of litigation stretches out from that point, putting off entry of the ultimate final judgment, the question arises of the remedy for the time value of money during the time consumed by further litigation. The most frequent cause of lapse of substantial time is the slow cadence of appellate review. Appellate process unfolds in stages of considerable length even if only one level of appeal is involved. Should Supreme Court intervention be sought, many years elapse between verdict or finding and ultimate final judgment. Even without any appeal, proceedings after verdict or finding in a district court may result in a gap between the fact-finder's determination and the trial court's judgment.

The central question is the nature and extent of the remedy under §1961, illuminated by Appellate Rule 37, for the time

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13. *See* FED. R. CIV. P. 58

14. FED R. CIV. P. 62

value of money gained and lost during an extended period of litigation after verdict or finding. The issues arise, of course, only if a plaintiff—at the end of the whole process—is held to be entitled to a money judgment. Once the ultimate judgment is entered, a plaintiff is entitled to interest on the amount of that judgment until it is paid. The question posed here is whether plaintiff is also entitled to adjustment of the amount of that judgment for the period from the fact-finder's determination, by verdict or finding, to the ultimate judgment. Does interest accumulate for the time that elapses as district court proceedings go forward and appeals run their course?

The restitution principle provides an unequivocal affirmative answer to the question. After the fact-finding inquiry closes, the amount of a plaintiff's merits-claim is fixed. Further lapse of time before payment results in defendant being enriched while plaintiff incurs loss measured by the time value of the money. The only remedy for this period is interest on the judgment. The question of a remedy for the period between a fact-finding determination and the ultimate judgment is, in theory, present in every case. In one simple model, when a district court's final judgment follows immediately after verdict and no appeal is taken, there may be no gap at all. As litigation becomes more complex, however, the time periods grow and the amounts of money at stake become more than *de minimis*. In extended cases, the amounts of interest for this period may eclipse the amount of a plaintiff's underlying claim. This part of the paper addresses the extended case, the cases where the greatest adjustments may be required.

The prototypical extended case is one in which a plaintiff reaches an ultimate legal victory on the merits-claim (a) when a court of appeals affirms a lower court judgment for money, or (b) when a court of appeals vacates an erroneous trial court judgment and instructs the trial court to enter a new money judgment for plaintiff. Most of the cases that have presented issues of the remedy for extended litigation are based upon the delays inherent in appellate review. Some cases, however, become extended in the district courts, when post-trial motions remain open for decision for substantial periods of time. The

most protracted cases are those that combine lengthy appellate review with lengthy trial court consideration of post-trial motions.

In federal court, extended litigation poses three questions of construction of §1961 and appellate Rule 37.

(a) Section 1961 provides that interst be "allowed on a money judgment." In extended litigation, which judgment determines that interest is to be allowed?

(b) For what period of time is interest to be allowed? Does the statute allow the period to begin before the controlling judgment is entered?

(c) What is the rate of interest used where the period of interest accrual begins before the controlling judgment?

The first two questions, which are interrelated, are addressed in Part A. Part B considers the question of the rate of interest to be applied.

A. "Allowance" of Interest: Time Periods Covered

(1) Power to Allow Interest: The Statute and Rule

The language of §1961 is not free from ambiguity, but the statute, construed in light of Rule 37 and its manifest remedial purpose, clearly allows plaintiffs who ultimately prevail in actions for money judgments to recover interest on those judgments for time consumed during extended litigation.

In extended litigation, inevitably multiple judgments are entered. Section 1961 does not, on its surface, speak clearly to the question of interest when more than one judgment has been entered in a case. Earlier judgments of a district court are superseded by later judgments of that court. Judgments of appellate courts, affirming, reversing, or modifying district court judgments, add to the sequence of judgments. As cases move from stage to stage, past judgments no longer have force and effect. Well-defined procedural law deals with the suspension and vacation of prior judgments as litigation moves along.[15]

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15. Pending a final outcome, execution of a judgment not vacated can be and normally is stayed as litigation proceeds. *See* FED. R. CIV. P. 62; FED. R. APP. P. 8

Which of the several judgments entered during the course of extended litigation triggers the operation of §1961?

The statute declares that interest shall be allowed "on any money judgment in a civil case recovered in a district court" and that "such interest shall be calculated from the date of the entry of the judgment." In the context of extended litigation, the judgment signified by "any money judgment" is a judgment at the conclusion of the litigation. Until all questions as to defendant's liability on the merits-claim, or as to the amount to be recovered on that claim, have been resolved, a "correct" judgment for the proper amount against the proper defendant may not ever have been entered in any court. All intermediate judgments may have been infected by some error. Intermediate judgments are not final in the sense that execution of those judgments is timely. While extended litigation moves along, earlier judgments are changed, vacated, or superseded by later judgments. Until no further changes in the underlying merits-claim issues are expected, it is premature to consider adding interest on any judgment.

Rule 37 of the Rules of Appellate Procedure confirms that the ultimate judgment of a court of appeals, at the end of litigation prolonged by appeal, controls the allowance of interest. Prior to adoption of the Rules, failure of a court of appeals to include instructions as to interest in its mandate was tantamount to denial of interest on the judgment to the date of the appellate court's judgment. *See, e.g.*, Note, *Interest on Judgments in the Federal Courts*, 64 YALE L.J. 1019 (1955). Rule 37, adopted in 1967, corrected perceived problems in that body of decisions.

The first sentence of Rule 37, dealing with a court of appeals' affirmance of a district court judgment for money, provides for inclusion of interest during the period of appeal. The Advisory Committee's Notes state that the first sentence is intended to clarify "some confusion on this point" in prior cases.[16] The substance of the first sentence is a standing term,

16. For a more extensive discussion of the confusion among the courts, *see* Note, 64 YALE L.J. 1019, 1022-1029 (1955).

incorporated into every mandate in cases of this nature, directing that interest be allowed for a period prior to the court of appeals' judgment.

The second sentence applies whenever a district court judgment is modified or reversed with a direction that a money judgment be entered. In this procedural setting, the Rule requires, in every case, that the court of appeals issue instructions with respect to allowance of interest for the preceding period of time. In 1948, the Supreme Court had held that where a court of appeals' mandate made no mention of interest for the period of the appeal, even though plaintiff prevailed on appeal, the district court was powerless to add interest for that time. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). The Advisory Committee Notes to Rule 37 state that the second sentence is "a reminder" of the *Briggs* rule so that courts of appeals will not be silent, but will rather overtly instruct district courts with respect to interest.

Rule 37, in both sentences, confirms that the controlling judgment which confers the corollary remedy of interest for successful plaintiffs, is the judgment of the appellate court bringing the litigation to a close.

In addition to identifying the controlling judment on which interest is allowed under §1961 (and the controlling court), the Rule indisputably indicates that the proper period of interest antedates that controlling judgment. When a district court's money judgment is affirmed on appeal, the first sentence of the Rule provides that interest be allowed from the date of the judgment in the court below being sustained. When a district court's judgment is modified or reversed with direction to enter a money judgment, the Advisory Committee's Notes explain that the court of appeals must instruct the district court regarding interest for the period of appeal from the erroneous ruling of the court below:

> In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the

question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal.

The Advisory Committee's explanation of the Rule refers explicitly to allowance of interest from the date on which a correct district court judgment should have been entered.

This result has been reached by some federal courts by "equitable construction" of §1961.[17] What these courts mean, it appears, is that the "date of the entry of judgment," from which interest begins to accrue, is that date on which a correct trial court judgment should have been entered. The same result could be reached by interpretation of the statute to give effect to its manifest purpose.[18]

(2) Federal Case Law Interpreting the Statute and Rule

(a) *Cases Extended by Appeals*

We turn next to the body of precedents in extended litigation where the issue has arisen regarding a remedy for

17. The general principle of "equitable construction" of the statute is traced to a decision of the Supreme Court more than a century ago. National Bank v. Mechanics' National Bank, 94 U.S. 437, 24 L. Ed. 176 (1877).

Courts have not considered, apparently, an alternative rationale that recovery of interest for the period between the initial decision by a trial court and the ultimate judgment could be characterized as pre-judgment interest, recoverable without reference to §1961.

18. Courts that have relied upon the principle of "equitable construction" of §1961 appear to have been concerned with construction of the third sentence, which provides that interest "shall be calculated from the date of entry of judgment." A superficial reading of "from" would limit interest on judgments to periods after judgments. The "equitable construction" assumes a correct judgment to have been entered on the date that, in the court's view, interest should begin to accrue. One could arrive at the same conclusion by a less superficial reading of "from." Interest on a judgment is a corollary remedy incident to the ultimate merits-claim determination that a plaintiff is entitled to a sum of money. An interest calculation "from" that point could look backward as well as forward.

the time value of money for the period of the litigation after verdict or finding.

All of the federal courts that have decided the issue have construed §1961 and Rule 37 to mean, in extended cases, that the controlling judgment bringing the controversy over the merits-claim to a close is the judgment that establishes the plaintiff's right to interest on the judgment and that the allowable period of interest under §1961 begins before that controlling judgment has been entered.[19]

Federal courts have applied the remedy of judgment interest to varying periods of time so that this remedy extends back to the dates when no further adjustments for time value of money were made on the amounts to be recovered on the merits-claims.

The most considered opinion evaluating plaintiffs' recovery of interest on a judgment is that of the Ninth Circuit in a 1983 case. The Court of Appeals reversed a trial court judgment

19. Case law on these points exists only in decisions of courts of appeals and district courts. The Supreme Court's views are indicated by its promulgation of Federal Rule of Appellate Procedure 37. The Supreme Court granted certiorari to take up the question in Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948). The Court disposed of that case, however, without reaching the question of interpretation of §966 of the Revised Statutes, the predecessor of §1961. The Supreme Court decision went off on the ground that the district court was powerless to add interest on a judgment when the court of appeals, reversing the district court's initial ruling that it lacked jurisdiction, ordered reinstatement of the amount of plaintiff's claim found by jury verdict but did not mention interest in the mandate.

The so-called *Briggs* rule, allocating exclusive power to the court of appeals to allow interest for the period between an erroneous district court decision and the appellate court's reversal, has been incorporated into Fed. R. App. P. 37. The rule requires courts of appeals to make explicit their decisions regarding interest in their mandates to the courts below. Omissions of this interest term may be corrected by timely motions for amendment of the mandate. *E.g.*, Reaves v. Ole Man River Towing, Inc., 761 F.2d 1111 (5th Cir. 1985). Occasionally, a motion to recall a mandate is rejected as untimely. *See, e.g.*, Lee v. Terminal Transport Co., 301 F.2d 234 (7th Cir. 1962); Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976); Alexander v. National Farmers' Organization, 614 F. Supp. 745 (W.D. Mo. 1985).

n.o.v. for defendants, and went on to consider the effect of that reversal on plaintiff's right to interest. Holding that interest on the judgment should be allowed from the date of the verdict, the court's reasoning was as follows:

> The purpose of awarding interest to a party recovering a money judgment is, of course, to compensate the wronged person for being deprived of the monetary value of the loss from the time of the loss to the payment of the money judgment.
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> * * *
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> A jury verdict or trial court decision in favor of plaintiff should ordinarily include, as part of the damages award, interest on the monetary loss resulting from the breach or injury from the date of breach or injury to the date of ascertainment of damages, whether such interest be denominated prejudgment interest or interest by way of damages. Where judgment is entered promptly on the verdict, section 1961 ensures that the plaintiff is further compensated for being deprived of the monetary value of the loss from the date of ascertainment of damages until payment by defendant.
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> * * *
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> Where, as here, the initial ascertainment of damages is left standing but a delay occurs between the date of that ascertainment and the date of the eventual entry of judgment based on that ascertainment, the result should not differ. The real issue lurking behind the proper interpretation of section 1961 is, regardless of why a delay exists between the verdict and the entry of judgment based on that verdict, "who should bear the cost resulting from the loss of the use of money."
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> * * *
>
> It would be anomalous to read section 1961 so narrowly that the cost of delay in payment is imposed on a successful plaintiff. We adopt the equitable construction of section

> 1961 suggested by the Supreme Court in *Mechanics' National Bank* [94 U.S. 437 (1876)] and enunciated by the Fifth Circuit in *Pratt* [142 F.2d 849 (5th Cir. (1944))] and its progeny and accordingly hold that plaintiff is allowed interest under Section 1961 from October 6, 1978 [the date of the verdict] until paid.

Turner v. Japan Lines, Ltd., 702 F.2d 752, 756-757 (9th Cir. 1983).[20] The cases allowing interest for the period of extended litigation can be classified into three categories:

First are the cases in which the amount of a defendant's potential liability was settled by verdict or other fact-finding decision and, thereafter, litigation continued to resolve controversy as to defendant's liability. When it was ultimately determined that defendant was liable, the amount of recovery was the amount established in the earlier verdict or judicial fact-finding decision.

Second are the cases in which the amount of a plaintiff's recovery continued in controversy after a judicial determination established defendant's liability. Ultimate resolution of the amount of recovery entailed molding of an earlier verdict or court-finding or use of evidence compiled for that earlier fact-finding inquiry. The common thread in these cases is use of

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20. *Turner* was the culmination of a series of decisions in which the Ninth Circuit interpreted §1961 to take account of the sharp rise in the time value of money. Twenty years earlier, in an extended case, the District Court found for the United States in an action under the Surplus Property Act and awarded $8,000. The Government successfully appealed, establishing the right to recover $159,000. The Government sought interest on the judgment in that amount for a period beginning with the date of the trial court's erroneous award. The District Court refused and the Court of Appeals affirmed. United States v. Hougham, 301 F.2d 133 (9th Cir. 1962). The Court of Appeals recognized that the Government had been deprived of the time value of the money for over four years, but denied relief with the laconic explanation: "The law is not perfect." 301 F.2d at 135. The 1983 opinion in *Turner* describes the *Hougham* opinion as having indicated a preference for "narrow interpretation" of §1961, a preference described as dictum and gently laid aside. 702 F.2d at 755 n.3. The Court of Appeals interred *Hougham* again the following year. Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1299 n.27 (9th Cir. 1984), *cert denied*, _____ U.S._____, 105 S. Ct. 963 (1985).

a measure of the amount of recovery that did not take into account the time value of money associated with the period of extended litigation.

Third are cases in which both defendant's liability and the amount of recovery were controverted through extended litigation with an ultimate conclusion, favorable to plaintiff, measured by factual evidence that did not take into account the time value of money associated with the period of extended litigation. The third category could be considered a variation of the second, in that defendant's liability, while reconsidered, had been substantially established by an earlier judicial determination.

As we shall see, federal courts have concluded generally that interest on judgments should accrue during the period of extended litigation from the date of a significant determination of the amount of recovery or the date on which liability was established or substantially established, if, and this is the critical element, the ultimate judgment does not take into account the time value of money associated with the period of extended litigation in fixing the amount of plaintiffs' recoveries. Not all decisions fit under this broad principle of restitution. The bulk of the litigation has occurred in recent years, as the significance of time value of money become more evident to the parties and to the courts. The most well-considered opinions are entirely from the past fifteen years.

(i) Merits-Claim Liability Established After the Amount of Recovery Had Been Settled

The *Turner* case illustrates one common variant of the pattern of extended litigation in which controversy as to defendant's liability on the merits continued after the amount of potential liability had been settled. The District Court granted judgment n.o.v. for a defendant, an erroneous judgment of non-liability ultimately reversed by the Court of Appeals.

The same pattern exists when a district court enters judgment for plaintiff, defendant appeals, and the trial court judgment is affirmed. The amount of recovery on the merits-claim remains fixed while the defendant's appeal is pending. Adjustment of that amount for the time value of money associated with

the period of appeal can be effected only by allowance of interest on the ultimate judgment from the date of the trial court's earlier decision. The *Devex-General Motors* case illustrates this pattern. The compelling reason to allow interest on a judgment to adjust for benefits and losses on pending appeals, as a matter of restitution, is obvious in this pattern.[21] The first sentence of Appellate Rule 37 explicitly allows interest in every case of this kind. *See also Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984).[22]

Apart from the essentially non-controversial category of cases of appellate court affirmances of trial court judgments for

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21. In some cases, courts of appeals have characterized their actions as "substantial affirmances" of lower court judgments as a reason for granting interest on the periods of time involved in the appeals. *E.g.*, Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971). *See also* Kneeland V. American Loan & Trust Co., 138 U.S. 509, 11 S. Ct. 426, 34 L. Ed. 1052 (1891). In *Brooks*, the interest recovery was sought against the United States. Prior to the 1982 amendment of 28 U.S.C. §1961, interest recoveries in suits against the United States were dealt with in other statutes. The law in question in *Brooks*, 31 U.S.C. §1304(b)(1)(A), defined the right to recover and the period for which interest was recoverable in language different from that of §1961. A "substantial affirmance" characterization aided in construction of § 1304(b)(1)(A) to allow interest. In cases governed by §1961 and Rule 37 of the Appellate Rules, a "substantial affirmance" characterization would allow invocation of the first sentence of Rule 37, which might avoid procedual probiems under the *Briggs* rule when a court of appeals' mandate had contained no instruction as to interest. Plainly Rule 37's second sentence contemplates allowance of interest when judgments of lower courts have been reversed or modified, whether or not the judgments of the lower courts have been substantially affirmed.

In what Learned Hand described as a "peculiarity of admiralty practice," when a claimant took an appeal from a judgment in his or her favor, no interest would accrue during the pendency of the appeal if the court of appeals affirmed the judgment of the district court. Lauro v. United States, 168 F.2d 714, 716 (2d Cir. 1948). The first sentence of Appellate Rule 37 does not differentiate between defendants' and plaintiffs' appeals. The Second Circuit acknowledged the force of Appellate Rule 37, adopted in 1967, and overruled the peculiar admiralty rule. Kotsopoulos v. Asturia Shipping Co., S.A., 467 F.2d 91 (2d Cir. 1972).

22. The *Litton* case is discussed later with respect to the issue of the proper rate of interest to be applied. See pp. 32-34 *infra*.

plaintiffs, the best example of litigation in which the amount of recovery is fixed before liablity itself has been finally established is found in cases in which trial courts erroneously set aside verdicts or other fact-finding determinations that established the amount of plaintiffs' recoveries.

Turner is one of a number of court of appeals' decisions holding that interest may be allowed for the period of appeal from erroneous trial court judgments setting aside verdicts for plaintiffs and ordering judgments for defendants n.o.v. *See, e.g., Louisiana & Arkansas Ry. Co. v. Pratt,* 142 F.2d 847 (5th Cir. 1944); *Givens v. Missouri-Kansas-Texas R. Co.* 196 F.2d 905 (5th Cir. 1952); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 509 F.2d 784 (5th Cir. 1975); *Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985); *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986) *(en banc). And see Bell v. Westinghouse Electric Corp.,* 507 A.2d 548 (D.C. App. 1986). All of these cases, with the exception of *Affiliated Capital,* held that an interest recovery should be granted.[23]

Closely related to the procedural setting of an erroneous trial court judgment n.o.v. for defendant are those cases in which trial courts erroneously granted new trials or erroneously required plaintiff to accept a remittitur to avoid a new trial. *See, e.g., Taylor v. Washington Termianl Co.,* 308 F. Supp. 1152 (D.D.C. 1970) (erroneous order granting new trial); Fassbinder v. Pennsylvania R. Co., 233 F. Supp. 574 (W.D. Pa. 1964) (erroneous order granting new trial); *Gorsalitz v. Olin-Mathieson Chemical Corp.,* 429 F.2d 1033 (5th Cir. 1970) (erroneous requirement of remittitur). After plaintiffs had ultimately succeeded in obtaining reversals of the erroneous orders, interest was allowed from the dates of the original verdicts in all of these cases.

Sustaining of a post-trial motion under Rule 60(b) of the Federal Rules of Civil Procedure may present a comparable

23. *In Affiliated Capital,* the Fifth Circuit held that the interest remedy for the period of delay in protracted litigation was a remedy that was within the discretionary power of the courts to grant or to deny on a case-by-case evaluation. The Fifth Circuit decision is probably unique. Discussion of this aspect of *Affiliated Capital* appears at p. 27 *infra.*

issue regarding interest on a judgment. For example, a trial court set aside an award by a panel of arbitrators, erroneously ruling that the award was tainted by conflict of interest. Having earlier confirmed the award, the trial court thereafter granted a motion to set the judgment aside under Rule 60(b). The Seventh Circuit reinstated the judgment, confirming the award with interest from the date of the original judgment. *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984).

(ii) Merits-Claim Liability Established Before the Amount of Recovery was Settled

When the amount of recovery on merits-claims is a matter of extended controversy, the final resolution of the controversy often involves a court's shaping of factual matters ascertained as litigation proceeded. Various litigation devices are used in appropriate contexts to avoid the expensive and time-consuming process of *de novo* litigation of facts. As a result, the ultimate determination of the amount to be recovered may fail to take account of the time value of money associated with the litigation period following the decision establishing a defendant's liability. In these circumstances, federal courts generally allow interest on judgments back to the dates on which liability was established.

When a trial court errs only in the amount of a plaintiff's recovery on the merits-claim, it is sometimes possible, without further factual hearing, to ascertain from the trial court's original finding the amount to be added or subtracted. Two kinds of trial court error exemplify this situation. The court may determine correctly the total amount of plaintiff's loss but allocate that total incorrectly among parties to the litigation. Correction is accomplished by reallocation of the respective portions. In another setting, a trial court may erroneously include or exclude damages of a certain kind. Where the fact-finding process has already ascertained the amount of those damages, correction of the erroneous judgment is accomplished by subtracting or adding the known amount. Cases of both types exist.

In tort cases involving issues of comparative negligence or joint and several liability of multiple defendants, a district court

may err in allocating the injured person's loss among the relevant parties. In a tort case that presents an issue of comparative negligence, the district court's assessment of plaintiff's gross damages may be unassailable, but the allocation of percentages of fault may be held erroneous. Thus, in a case arising out of an airplane landing accident, the District Court originally apportioned negligence between the pilot and the Government on a 25%-75% basis. After the Court of Appeals reversed for error in the lower court's analysis, the District Court found that the Government was liable for only 60% of the loss. The trial court held further that interest on the amount of the Government's liability so found would run from the date of the earlier erroneous apportionment. The Court of Appeals for the Fifth Circuit affirmed. *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985). *See also Coyle Lines, Inc. v. United States,* 195 F.2d 737 (5th Cir. 1952).

Valuation of a plaintiff's claim below the correct amount occurs if a trial court excludes from its calculation recovery for a certain type of damages. Correction of that kind of error may not require reopening of any fact-finding inquiry. In two cases, the errors could be corrected by addition of the amounts previously determined for damages of the kind without conducting fresh factual inquiry. *See, e.g., Maxey v. Freightliner Corp.,* 727 F.2d 350 (5th Cir. 1984) (after verdict including an amount for punitive damages, district court erroneously disallowed punitive damages); *Laffey v. Northwest Airlines,* 582 F. Supp. 280 (D.D.C. 1982) (statutory double damages for violation of "Equal Pay Act" erroneously disallowed). The courts in *Maxey* and *Laffey* allowed interest on the judgments from the date of the erroneous judgments.

Valuation of a plaintiff's claim above the correct amount occurs if the trial court improperly includes in its calculation damages of a kind not recoverable. In a Ninth Circuit case, the trial court erroneously included a specified amount of damages as punitive damages. After reversal by the Court of Appeals, the District Court entered judgment for compensatory damages only and ruled that interest would run on the judgment from the

date of its original judgment. The Court of Appeals affirmed. *Lew Wenzel & Co. v. London Litho Supply Co.,* 563 F.2d 1367 (9th Cir. 1977).

When a trial court commits error as to the amount of damages and the correct amount is not ascertainable from the original fact-finding process, ordinarily the only recourse is a new trial on the issue of the amount of recovery on the merits-claim. When that trial is held, the new evidence may include pre-judgment interest, or other appropriate adjustment for time value of money, so that the second fact-finding process may take into account time value of money for the period of time since the erroneous trial court determination. If that occurs, the period of interest on the judgment properly begins at the date of the later fact determination.

The clearest example would be a case in which the district court erred in the amount of pre-judgment interest allowed. Recalculation of pre-judgment interest by the court at the proper rate and to the date of the new judgment would fully remedy the delay. So long as pre-judgment interest continues to accrue during the prolongation of litigation, the period for allowing interest on the judgment under §1961 does not commence. *See Ashland Oil, Inc. v. Phillips Petroleum Co.,* 607 F.2d 335 (10th Cir. 1979), *cert. denied,* 446 U.S. 936 (1980); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.,* 213 F.2d 443 (2d Cir. 1954).[24]

When a trial court errs only as to the amount of a plaintiff's recovery on the underlying merits-claim and a new trial or other proceeding is required to ascertain the correct amount of the recovery, but the new trial or other proceeding measures the recovery without taking into account lapse of time since the original fact-finding decision, courts tend to allow interest on the judgments to accrue from the dates on which the trial courts found defendants liable, even though the proper amount of

24. *But see* Peterson v. Crown Financial Corp., 553 F. Supp. 114 (E.D. Pa. 1982) (trial court held to have erred in setting rate of pre-judgment interest: on remand, court corrected error but allowed pre-judgment interest only to the date of the original judgment with interest on the judgment thereafter).

recovery was not ascertained until later. In this group of cases, although liability is fixed earlier, the amount of ultimate recovery is uncertain until the controlling judgment. In some of these cases, the amount eventually found due on the merits-claim was lower than the erroneous prior judgment. In other cases, the amount found due at the end was higher. Regardless of the direction of the change, courts with minor exception allowed interest on the judgments to begin to accrue as of the dates of the erroneous judgments.

Illustrative is an Elkins Act case in which the Court of Appeals for the First Circuit was able to modify the lower court's judgment to eliminate a portion of the damages wrongfully included by the District Court. *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971). The First Circuit ordered interest on the modified judgment to begin as of the date of the erroneous trial court judgment.

Similarly, the Court of Appeals for the Ninth Circuit reduced an award of attorneys' fees to the prevailing plaintiff in a private antitrust action, but ordered that interest on the lowered amount run from the date of the original award. *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973).[25] *And see*

25. The Ninth Circuit declined to follow a 1952 decision by the Seventh Circuit, which reduced an attorneys' fees award and directed that interest on the award begin with the Court of Appeals' decision. Harris v. Chicago Great Western Ry. Co., 197 F.2d 829 (7th Cir. 1952). The Seventh Circuit's opinion reflects that court's very considerable antipathy to the claim for attorneys' fees in a shareholder derivative suit. The court said that the amount of plaintiff's request "seems to us so unreasonable as to shock the judicial conscience. . . . Indeed, the amount to which we have reduced the fees may still seem extravagant not only to the public but to other members of the bar." 197 F.2d at 836. That this attitude affected the court's decision regarding interest on the fee award cannot be established with certainty, but some relationship is likely.

In a subsequent Seventh Circuit case, a proceeding against the United States under the Tort Claims Act, the Court of Appeals held that the first trial court's determination of damages was erroneously high and directed the lower court to eliminate all elements of a certain kind of expenses from the damage calculation. In a later appeal, the Seventh Circuit held that interest on the revised judgment commenced on the date of that judgment. The decision was an interpretation of a provision of the Tort Claims Act, not of 28 U.S.C. §1961. Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960).

Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979).

The Sixth Circuit brought a personal injury case to a close eight years after the accident by deciding, after two prior reversals, not to remand again to a District Court which had not fully complied with the appellate court's earlier mandate. The Court of Appeals, using the record before it, made an elaborate calculation of the amount to be recovered by each of ten plaintiffs. The Court of Appeals ordered interest on these amounts to accrue from the date of the District Court's earlier erroneous judgment. *Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973).

In a Fifth Circuit case, the trial court erred in setting too low an amount of attorneys' fees to be recovered by a plaintiff who had prevailed in a private antitrust action. The Court of Appeals directed the District Court to reconsider the amount. On appeal from the District Court's subsequent order increasing the amount of the fees recovery from $45,000 to $266,000, the Court of Appeals ordered that interest accrue on the increased amount from the date of the erroneous award. *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (*en banc*).[26]

A similar result was reached in a suit against the United States under the Public Vessels Act. A series of erroneous determinations of the amount of plaintiff's claim, with ensuing appeals, resulted in substantial delay before the case was brought to a close in 1974. The District Court then held that interest on that amount should accrue from 1968:

> The fact that this court has been unable to compute damages satisfactorily and that our decisions have been reversed and remanded twice should not work to plaintiff's detriment. She became entitled to interest as of the day the final judgment on liability was rendered, and it would be

26. Portions of the increased amount of attorneys' fees were compensation for services involved in the appeal from the District Court's erroneous award. The Court of Appeals held that the period of interest on these sums did not relate back to the date of the original award.

inequitable to impose the costs associated with the use of money on her rather than on the defendant whose wrongful conduct resulted in the invocation of the judicial process and who had use of the money during the pendency of the various appeals.

Mascuilli v. United States, 383 F. Supp. 50, 53 (E.D. Pa. 1974), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975).[27] Interest was thus allowed for a substantial period of time during which the correct amount of the judgment was not yet known. Search for the correct amount did not entail adding pre-judgment interest. The court decided that the period of the restitution remedy began when defendant's liability was established even though the amount of damages was not made certain until later.

Mascuilli and *Copper Liquor* contrast with a personal injury case in the Eighth Circuit. A bench trial concluded with judgment for plaintiffs. The Court of Appeals affirmed as to liability, but held that the trial judge's findings as to damages were insufficient under Fed. R. Civ. P. 52(a). On remand, the District Court made explicit findings and entered a new judgment in the same amounts of its original judgment. The Court of Appeals held that judgment interest accrued only from the date of the second judgment. *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977). The only authority relied upon by the Court of Appeals was one prior case in which plaintiff had failed to get an Appellate Rule 37 mandate regarding interest and a request for recall of the mandate was no longer timely. *Riha v. International Telephone & Telegraph Corp.*, 533 F.2d 1053 (8th Cir. 1976).[28]

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27. The *Mascuilli* court applied a provision of the Public Vessels Act for interest on judgments, but the court's rationale equally fits cases governed by §1961.

28. *Hysell* was not cited by the Eighth Circuit in its 1985 decision embracing the principle of restitution as applied to interest on judgments in extended litigation. Buc v. Burton, 768 F.2d 285 (8th Cir. 1985). *And see* Premier Corp. v. Serrano, 471 F. Supp. 444 (S.D. Fla. 1979).

A 1962 decision in the Ninth Circuit allowed interest from the second determination of the amount of plaintiff's recovery. In that case the trial court had initially awarded damages to the United States of $8,000, but the

(iii) Merits-Claim Liability and Amount of Recovery Reconsidered

In a number of cases, after trial courts had found defendants liable on the merits-claims, appellate courts found errors in these findings that required further proceedings in the trial courts with regard to liability and those further proceedings involved redetermination of the amount of recovery as well. In these cases, the question of liability was again decided against defendants. However, the amounts of recovery were based upon the evidence relied upon in the original proceeding. Thus, no adjustment was possible for the time value of money associated with the time of appeal and retrial. In these circumstances, in three cases, the Court of Appeals for the Ninth Circuit held that interest on the later judgments would begin to accrue at the time of the original, erroneous decisions. All three cases were private antitrust actions.

In two of these extended cases, the amount of damages eventually found in the second bench trials were the same in nominal dollars as the damages found in the original trials. A statute of limitations issue was involved in the first of these cases. A Supreme Court decision resolved that issue in a way that required the case to be tried again. Plaintiffs again recovered. The amount of the damages found in the second trial was the same as in the first trial. In the second case, the District Court retried the case on its merits because an erroneous definition of the relevant market had been used in the first trial. Again, plaintiffs prevailed on the merits of the antitrust case, and again there was no change in the amount of damages. In both cases, the Ninth Circuit held that interest under §1961 would run from the dates of the original District Court judgments. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980); *Twin City Sportservice, Inc.*

Government established on appeal that it was entitled to recovery of $159,000. United States v. Hougham, 301 F.2d 133 (9th Cir. 1962). While never overruling *Hougham*, the Ninth Circuit has entirely disavowed the "narrow interpretation" of §1961 that underlay the 1962 decision. See text and note at n.20 *supra*.

v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.), *cert denied*, 459 U.S. 1009 (1982).

The third of the Ninth Circuit's major cases requiring retrial did result in a change in the amount of plaintiffs' recovery. Unlike *Mt. Hood Stages* and *Twin City Sportservice*, this case involved a jury trial. The first judgment, based on the first verdict, was vacated on appeal for error in the jury instructions on the burden of proof of wrongful conduct and on the scope of recoverable losses in antitrust litigation. The second verdict, also for plaintiff, was substantially higher in amount than the first. Trebled, the initial verdict was $6.219 million, whereas the second verdict, trebled, was $10.762 million. The Ninth Circuit found that the higher verdict of the second jury was not based on the jury's having considered the time value of money between the first and second verdicts. Therefore, the court concluded, it was proper to take account of the time value of money for that period by allowing interest on the amount of the original judgment. The Ninth Circuit held that plaintiff should receive interest under §1961 on the $6.219 million for the six-year period between the two verdicts. Thereafter, the court held, interest under §1961 ran on the higher amount of the second verdict plus attorneys' fees. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984).

The Ninth Circuit's decision in *Handgards* is sound in its conclusion that the period of judgment interest should begin as of the date of the original verdict, but the principal sum for the entire period of judgment interest should have been the amount of the second verdict. Both juries found defendant liable for violating antitrust law. The different burden of proof did not alter the conclusion in the first trial. In this sense, as in *Mt. Hood Stages* and in *Twin City Sportservice*, the second verdict confirmed the liability conclusion in the first verdict. However, in *Handgards* defendant argued successfully that the amount of recovery in the first verdict had been incorrect. That verdict was vacated and the issue of amount of recovery was retried to a new jury. Only the second verdict was unassailable as to the amount of plaintiff's recovery. Since the retrial did not include adjustment for the time value of money or the interval between the

first verdict and the second, the better conclusion would use the amount of the second verdict as the principal sum for calculation of interest on the judgment.[29]

The modern decisions discussed above provide overwhelming authority for the conclusion that, in litigation extended by appeals, federal courts have the power to provide a remedy for the time value of money associated with delay in such litigation running its course. A different view was espoused, some thirty years ago, by the Court of Appeals for the Second Circuit. That court concluded that the "equitable construction" of §1961, whereby interest on a judgment was allowed for a period before entry of the controlling judgment, was an erroneous reading of the statute. The Second Circuit so held in 1947 and, again, in 1958. *Briggs v. Pennsylvania R. Co.*, 164 F.2d 21 (2d Cir. 1947); *Powers v. N.Y. Central R. Co.*, 251 F.2d 813 (2d Cir. 1958) (erroneous trial court decision granting judgment n.o.v. for defendant).[30]

The Second Circuit has not spoken on the question since the adoption in 1967 of Rule 37 of the Federal Rules of Appellate Procedure. The Rule requires an appellate court, in a case like *Powers*, to include in the mandate a term expressly deciding whether or not interest is to be allowed for the time the case had been pending on appeal. A requirement that courts of appeals be explicit on the issue makes sense only if the courts have

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29. It does not appear that plaintiff sought recovery of judgment interest on this principle in the District Court. *See* Handgards, Inc. v. Ethicon, Inc., 552 F. Supp. 820 (N.D. Cal. 1982) *aff'd*, 743 F.2d 1282 (1984), *cert. denied*, _____ U.S. _____, 105 S. Ct. 963 (1985). Only the defendant appealed to the Court of Appeals. The appellate court, therefore, had no occasion to consider the correct principal amount to be used for the interval between the two verdicts. The Court of Appeals satisfied itself that the second verdict was not based on any evidence related to the period after the first trial and, on the basis, affirmed the District Court's decision.

30. A direct conflict between the Second Circuit and the Fifth Circuit emerged when the Second Circuit decided the *Briggs* case in 1948. The Supreme Court granted certiorari to resolve the conflict, but decided the case without reaching the question of the proper interpretation of the statute providing for interest on judgments. Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948).

statutory authority to allow interest to plaintiffs in this circumstance. The Second Circuit is unlikely to adhere to its idiosyncratic view of §1961 in light of Rule 37. *See Kotsopoulos v. Asturia Shipping Co., S.A.*, 467 F.2d 91 (2d Cir. 1972) (court applied Rule 37 to overrule its prior precedents regarding interest on judgments in admiralty actions).

It is fair to say, therefore, that it is generally settled law in federal courts, under §1961, that in cases extended by appeals, interest on money judgments may be allowed for the periods of the appeals and should be allowed if the amounts to be recovered in the ultimate judgments have not been adjusted to take account of the time value of money associated with the periods of the appeals.

(b) Cases Extended By Post-Verdict Or Post-Finding Proceedings In District Courts

Only a few federal cases have considered the effect of extended trial court proceedings on the issue of interest on money judgments. The quality of the analysis in those few cases has been less than satisfactory. The restitution principle that was given force in cases extended by appeals is equally applicable in cases extended by the time required for district courts to resolve the questions presented by post-verdict or post-finding motions. In cases extended by appeals, the decisions that begin accrual of interest on the judgments from the dates of the verdicts or findings include periods of appellate review as well as periods of post-verdict or post-finding deliberations by trial courts. When lapse of time has resulted from extended trial court proceedings without further delay from appeals, the few decided cases have not always perceived that this type of delay enriches a defendant and causes a plaintiff reciprocal loss.

One case to do so involved a considerable gap between court-finding and entry of judgment due to apparent oversight by the court clerk. The remedial consequence of this inadvertent failure to enter a judgment into the formal record was the subject of a 1984 decision by the Court of Appeals for the Eighth Circuit. In a non-jury trial on a claimed overdue promissory note, the District Court had found for plaintiff. The court's

order, on May 10, 1983, did not appear in the formal record as a judgment until March 17, 1984. The Court of Appeals held that interest on the judgment began to accrue in May 1983 when the judgment ought to have been entered. The Eighth Circuit adopted the rationale of cases allowing plaintiffs relief where appellate review postpones entry of the final judgment: §1961 should be interpreted so that costs resulting from the loss of use of money are not imposed on prevailing plaintiffs. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Knudsen*, 749 F.2d 496 (8th Cir. 1984).

The Eighth Circuit decision is fully consistent in rationale and result with the decisions allowing recovery of interest for cases extended by appeals. In several other cases, however, the question of whether to allow interest in cases extended by trial court proceedings has been framed in an inappropriate manner.

A 1972 case addressed the effect of time that elapsed after a jury verdict as the district court resolved certain questions left open by the verdict. A judgment for plaintiff, based on the verdict, was not entered until six weeks later. Plaintiff sought interest, characterized as pre-judgment interest, for the six-week period. The Court of Appeals for the Fifth Circuit stated that six weeks was not an unreasonable time for the trial court's consideration of the issues still before it when the verdict was accepted. Relief was denied. *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972).

Under the reasoning in *Barrios*, allowance of post-verdict interest turns upon characterization of the time taken by a trial judge in deliberating upon motions or other matters that must be decided before that court enters its final judgment. To put the question in terms of dilatoriness of the court is unsound. Defendant's benefit and plaintiff"s loss of the time value of money occur whether the trial judge acts with dispatch or otherwise. To make a plaintiff's right to interest or a defendant's obligation to pay turn on the nature of a trial judge's actions is, to say the least, unseemly. In cases extended by appeals, allowance of interest never depends upon inquiry into how efficiently the court of appeals handles the business of the court. No such standard should be considered when the passage of

time results from a trial court's having had post-verdict motions, or other matters, under advisement. Interest on the controlling judgment, when it is entered, should run from the date of the verdict.

Prior to 1972, courts that addressed the issue of interest for periods of post-verdict proceedings in district courts characterized the question as a mechanical function determined by the formal act of entry of a judgment. Some have focused on the procedural distinction between a clerk-entered judgment under FED. R. CIV. P. 58 and a court-ordered judgment under FED. R. CIV. P. 54. Others have considered the procedural effects with respect to enforcement of a judgment that flow from the filing of motions for new trial or judgment notwithstanding the verdict. Sometimes the issue has been put in terms of finality of a judgment for purposes of appeal. The unstated premise in opinions of this set of cases is that the period of interest under §1961 must come after the date of entry of a judgment.[31]

The analytic weakness of the doctrine followed in these older cases is demonstrated by two more recent decisions, which ought to have been decided alike, but which came to opposite conclusions because the courts relied on FED. R. CIV. P. 54(b) to determine whether interest should have been allowed for periods of extended proceedings in trial courts after verdict.

In the first case, a private antitrust case, the Court of Appeals for the Seventh Circuit concluded that interest should be allowed for a 20-month period between verdict for money damages and trial court judgment. During that period, the District Court considered and denied defendant's motions for

31. *See, e.g.,* Murphy v. Lehigh Valley R. Co., 158 F.2d 481 (2d Cir. 1946); Christian v. Southern R. Co., 151 F. Supp. 192 (E.D.S.C. 1957); Howell v. Sinclair Refining Co., 20 F.R.D. 623 (N.D. Ala. 1957); Litwinowicz v. Weyerhaeuser Steamship Co., 185 F. Supp. 692 (E.D. Pa. 1960); Caputo v. U.S. Lines Co., 311 F.2d 413 (2d Cir.), *cert. denied,* 374 U.S. 833 (1963); Komie v. Buehler Corp. 449 F.2d 644 (9th Cir. 1971). The usual outcome of these cases was to withhold the restitution remedy for the period of post-verdict proceedings in the district courts. The *Litwinowicz* case found for plaintiff on the theory that the ultimate trial court judgment substantially affirmed the earlier clerk-entered judgment. *See* n. 21 *supra.*

new trial or judgment n.o.v. and, thereafter, considered and denied plaintiff's request for equitable relief. The District Court thereupon entered a money judgment for plaintiff in the amount of the jury verdict, trebled according to law, and denied interest on the period between verdict and judgment. The Seventh Circuit reversed. *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.,* 585 F.2d 821 (7th Cir. 1978), *cert. denied,* 440 U.S. 930 (1979).

In the second case, a personal injury case, considerable time elapsed when the District Court kept a motion for new trial or remittitur under advisement for over a year. On May 27, 1975, the jury returned a verdict for $7 million in favor of plaintiffs. On July 2, 1976, the District Court ruled that it would grant a new trial unless plaintiffs filed remittiturs for amounts in excess of $4.68 million. Plaintiffs agreed to the reduced recovery. On July 30, 1976 the court entered a judgment of $4.68 million. Plaintiffs then sought interest on the amount of the judgment, but to accrue from the date of the verdict. The District Court denied plaintiffs' request and the Court of Appeals for the District of Columbia Circuit affirmed. *Hooks v. Washington Sheraton Corp.,* 642 F.2d 614 (D.C. Cir. 1980).

Both courts of appeals deemed the controlling issue to be application of Rule 54 (b), which permits district courts to divide cases when more than one claim for relief is presented or when multiple parties are involved. The Seventh Circuit found that *Ohio-Sealy* was not subject to Rule 54(b) and, therefore, allowed interest from the date of a clerk-entered judgment at the time of the verdict. The District of Columbia Circuit held that *Hooks* was subject to Rule 54(b) because the defendant had filed third-party claims against its insurers, claims that were pending through the period between verdict and final district court judgment for plaintiff on the primary claim. A vigorous dissent in *Hooks* by Judge Mikva observed that the case was indistinguishable from *Ohio-Sealy* (642 F.2d 618, 619). The majority responded that the Seventh Circuit had also relied on Rule 54(b) but found it did not apply in that case.

Remarkably, neither the courts nor the attorneys in these cases seemed to be aware of the comparable body of law

regarding allowance of interest in cases extended by appeals. Neither plaintiff contended that the final district court judgment should have borne interest from the date of the verdict. Judge Mikva's well-reasoned dissent in *Hooks* tried to frame the dispositive issue as unrelated to Rule 54(b), but the dissent was unable to put the issue in a proper framework.[32]

Procedural rules applicable in district courts refer to judgments for many purposes. It is a mistake to consider any rule independent of its manifest purpose. The time for filing post-verdict motions is very short; the date that opens the period is fixed by a clerk-entered judgment under FED. R. CIV. P. 58, 59(b); *cf.* FED. R. CIV. P. 50(b). Ripening of the right of a party to take an appeal and setting a baseline for measuring the timeliness of a notice of appeal are functions of an entry of a judgment. FED. R. CIV. P. 73, 54(b). Execution of judgment becomes timely 10 days after its entry unless the court allows otherwise.

The question of the period of judgment interest to be allowed when extended proceedings occur in district courts is unlikely to be answered adequately by reference to docket entries. The remedial issue is separate from other aspects of district court procedure. Interest on a judgment is a corollary remedy incident to the final judgment. In many cases, clerk-entered judgments under Rule 58 will be a point to begin accrual of judgment interest, but an important and substantive

32. In *Ohio-Sealy,* the Seventh Circuit entertained a defense argument based upon Rule 54(b). The Court of Appeals found that this rule was not called into play in the case before it, thus distinguishing cases relied upon by defendant, rather than rejecting the argument as unsound in its premise. The Court of Appeals added, however, that "...it would make no sense to adopt the rule that interest to which [plaintiff] is entitled by law on its judgment properly entered under Rule 58 had to be forfeited if [plaintiff] desired to press its request for equitable relief." 585 F.2d at 846. The "sense" to which the Court of Appeals referred is an appropriate measure of the interest recovery, which is not necessarily determinable by the nature of the docket entries in a case. In *Ohio-Sealy,* a ministerial act under Rule 58 happened to fix the time when judgment interest should begin to accrue. The same result should be reached whether or not the court clerk carried out this duty on time.

remedial question should not be conditioned upon the ministerial act of a court clerk.

The same restitutionary purposes apply whether litigation is extended by trial court proceedings or by appellate review. The period of interest on a judgment should be related to the time when the amount of plaintiff's recovery on the underlying merits-claim became settled.

(3) Disallowance of Interest on Judgments in Extended Cases

Appellate Rule 37's provision on courts of appeals' decisions other than affirmances does not require allowance of judgment interest to relate back. The Rule requires that a court of appeals issue an explicit instruction with respect to interest for the period of the appeal. Neither the Rule nor the Advisory Committee's Notes make clear what circumstances would warrant a decision to disallow interest for the time before the court of appeals' judgment. One possibility, of course, is that the court of appeals may have factored into its calculation of the amount of a money judgment the time value of money for the full time before the appellate court's decision. If the court of appeals has not calculated the amount of the judgment, but remands for the lower court to do so, the nature of the remand may require that the distinct court make a calculation that factors in the time value of money up to the new determination of the principal sum of the money judgment.[33]

In a few cases, courts have denied judgment interest for some part of the period of extended litigation on the ground that interest should not begin to accrue until the amount of the principal obligation had been liquidated.[34] When the amount of

33. The court of appeals' judgment may be the first decision in the history of a case that establishes defendant's liability on the merits. Absent a prior verdict or trial court finding of either liability or the amount of recovery, the period of interest on the judgment would begin at the time of the court of appeals' judgment.

34. *See* Harris v. Chicago Great Western Ry. Co., 197 F.2d 829 (7th Cir. 1952); United States v. Hougham, 301 F.2d 133 (9th Cir. 1962); *cf.* Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960). *See also* Hysell v. Iowa Public Service Co., 559 F.2d 468 (8th Cir. 1977). In *Hysell,*

recovery on a merits-claim is in controversy, the amount may be ultimately fixed long after merits-claim liability has been established. Most of the cases in this category, as discussed earlier, give no weight to the notion that interest cannot accrue on an uncertain amount. This view has been associated in the past with awards of pre-judgment interest, but modern law regarding pre-judgment interest rejects this view.[35] Underlying the doctrine about uncertainty of amount was concern for a defendant's inability to stop accrual of interest by payment. Rule 67 of the Federal Rules of Civil Procedure allows a defendant, before or after trial, to deposit money in court and thereby control its interest liability for whatever amount defendant elects to deposit.[36] *Cf.* FED. R. CIV. P. 68. Whatever force exists in disallowing pre-judgment interest when neither defendant's liability nor the amount of recovery has been judicially established in any prior proceeding, the reasoning is inappropriate in any case involving interest on a judgment where a defendant's liability has been established conclusively and the only controverted issue is the amount of recovery.

The Fifth Circuit recently held that the discretion granted by Appellate Rule 37 and the leeway of "equitable construction" of §1961 permitted the court to disallow interest for the period of extended litigation even though the Court of Appeals had previously held that the District Court's judgment n.o.v. for defendant had been erroneous. The Court of Appeals explained its decision on the ground that plaintiff's victory on the merits-claim had not been "clear cut." The merit-claim was a private

NOTES *(Continued)*

a bench trial in a personal injury case concluded with a judgment for plaintiffs. The Court of Appeals reversed for lack of sufficient findings under Fed. R. Civ. P. 52(a). On remand, the District Court made specific findings of fact and awarded the same amounts to plaintiffs. The Court of Appeals, affirming, held that interest on the judgment did not begin until the second trial court judgment. The Court of Appeals relied solely on its own earlier decision denying relief for lack of an Appellate Rule 37 mandate and lack of a timely request to recall the mandate. Riha v. International Telephone & Telegraph Corp., 533 F.2d 1053 (8th Cir. 1976).

35. *See* note 3 *supra.*

36. *See* Perkins v. Standard Oil Co., 487 F.2d 672, 675 (9th Cir. 1973).

antitrust suit based upon a conspiracy between government officials and cable television companies to allocate territories within the City of Houston. The Court of Appeals had upheld plaintiff's right to recover against one of the private companies involved. In denying judgment interest, the court appears to have been influenced by the view that antitrust regulation will not be, in the end, a tool for regulating state or city governments. A concurring judge, Judge Patrick Higginbotham, wrote: "In my view, this defendant was defeated on the merits because it passed through a time window of changing law rather than because it engaged in conduct that was malevolent by antitrust standards." *Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706, 712, 713 (5th Cir. 1986).

The Fifth Circuit's decision in *Affiliated Capital* may be explicable on the narrow ground that plaintiff's victory on the merits-claim rested upon a substantive legal standard of doubtful validity in light of changing law. Whether the Court of Appeals will allow or require case-by-case consideration of the "equities" in other circumstances seems doubtful. Hard cases do sometimes make bad law. In reaching for a rationale to disallow judgment interest in this particular case, the Court of Appeals may have overstated the criteria to be followed in more typical cases. Allowance of interest on judgments ought to be determined by principled and predictable criteria. The language of *Affiliated Capital* does not meet this standard.

A 1983 district court decision disallowed interest on a judgment for the period between a verdict for plaintiff and final judgment in the district court. Judge Leval found that the substantial interval of time between verdict and judgment was attributable to three separate instances of misconduct by plaintiff's counsel. *Red Star Towing & Transporation Co. v. The Cargo Ship "Ming Giant",* 563 F. Supp. 224 (S.D.N.Y. 1983).

(4) Conclusion

Overall, federal courts have provided consistent and sound answers to the first two questions posed at the outset of this part of the paper. When extended litigation occurs, determinations regarding interest on judgments are a function of the ultimate

judgments that bring to a close the controversy on the underlying merits-claims. When those ultimate judgments are entered, courts look back through the time that has elapsed and allow interest on the judgments to begin to accrue when the amounts of recovery on the merits-claims are no longer subject to adjustment to take account of the time value of money. Allowance of interest on a judgment begins with the earlier of the date substantially establishing defendant's liability or the date settling the amount of recovery. These decisions of the courts are a reasonable interpretation of the governing statute, §1961, and the ancillary rule, Appellate Rule 37. The result goes far toward serving the restitutionary goal of treating parties to extended litigation neutrally, so that neither benefits nor suffers substantially from the passage of time needed to conclude litigation.

We turn now to the third question: what rate of interest applies in extended litigation with regard to judgment interest?

B. Rate of Interest Applicable in Calculation of Interest on Judgments

When a controlling judgment has established that a plaintiff is entitled to a money judgment and has determined that interest is to be allowed on the judgment, the "principal" of the classic interest calculation formula is fixed. The "time" element is resolved by the issues discussed in Part III A. With a known "principal" and the period of "time" established, the remaining factor is the "rate of interest." Multiplying the amount of the "principal" by the "rate of interest" for the determined "time" produces the amount of interest.

For calculations of interest on judgments in federal courts, the rate of interest is set by statute.[37] The purpose of this part of the paper is to examine the relevant statutory provisions and

37. Courts sometimes use the statutory rate for interest on judgments as a guide to the choice of a proper rate of pre-judgment interest. *See, e.g.*, United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938, 940 n.5 (4th Cir. 1983).

their implementation in cases allowing interest on judgments, particularly in protracted litigation.

(1) The Statutory Interest Rate

Section 1961(a) provides that interest shall be calculated:

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

Section 1961(b) adds:

> Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

The Treasury bill transactions to which the statutory rate of interest is indexed are well-known, regular transactions in the marketplace. The Treasury has borrowed money through this device regularly for many years. Records of the results of the auctions are readily accessible.[38] A chart tracing the average rates of interest over the past decade appears in Part I of this paper (p. 6 *supra*).

The statutory scheme in §1961 contemplates that, for any given judgment, only one reference will be made to the Treasury bill marketplace. The statute plainly rejects the possibility of a judgment being subject to a floating interest rate. Floating rates are commonly found in private credit transactions. Rates of interest in such transactions move up or down or remain constant in response to rate changes in the marketplace. For interest on a judgment, however, the rate observed in the market at a statutorily designated moment applies to that judgment as a fixed rate of interest for the entire period of interest accrual. A "snapshot" rather than a motion picture is taken. Section 1961 specifies that the point of time for reference

38. The statute requires the Director of the Administrative Office of the United States Courts to distribute notices of the rate and any changes in it. Notices from the Administrative Office serve the convenience of the courts, but the data are available, if necessary, from other sources.

to the Treasury bill market is "the last auction . . . immediately prior to the date of judgment."

In an ordinary case, the legislative choice refers to the Treasury bill rate settled just before the period of judgment interest begins to run. Where a district court's judgment follows promptly after the fact-finding determination and no appeal is taken, the whole period of interest on the judgment comes after entry of the controlling judgment.

If the period of interest on a judgment runs beyond one year, §1961 provides for compound interest to be calculated. The amount of accrued and unpaid interest at the end of the first year is added to the amount of the unpaid principal and, for the second year or any part thereof, interest accrues at the rate originally fixed for the judgment but on the total of unpaid interest and principal. Should the judgment remain unpaid at the end of another year, the same process of recomputing the amount of principal would be followed again.

(2) The Rate Of Interest Applicable In Extended Litigation

For reasons explored in Part IIIA, extended litigation differs from the simple model of litigation. In many cases, the period of interest on a judgment begins to run before the date of the controlling judgment. When interest on a judgment begins to accrue before the entry of the ultimate controlling judgment, proper application of §1961 must be determined. The legislative choices of applying a single rate of interest to the entire period of judgment interest, of setting the rate as of the beginning of the interest period, and of taking a "snapshot" of Treasury bill market rates immediately before the interest period can be adapted easily to cases of extended litigation. In such a case, after the period of interest accrual has been defined, the parties can make the requisite "snapshot" observation of the Treasury bill market place and apply the observed rate to the amount of the principal for that period. The process of implementation requires no intervention by courts. Section 1961 would thereby be applied consistently in simple cases and cases of extended litigation.

An example demonstrates the point. Assume that: (1) A jury verdict for plaintiff in the amount of $100,000 was returned May 1, 1985. (2) A timely motion for judgment n.o.v. was filed by defendant and granted by the trial court on November 1, 1985. (3) On September 1, 1986, the court of appeals reversed the judgment below, directed entry of judgment on the basis of the jury verdict of May 1, 1985, and provided by its mandate for interest from that date. In this situation, the controlling judgment is that of the court of appeals. The erroneous judgment below was entered months after the jury verdict. The date when judgment on the verdict in favor of plaintiff should have been entered was the date of the verdict. A clerk-entered judgment pursuant to Fed. R. Civ. P. 58 may or may not have been entered on that date. To carry out the manifest intent of §1961(a), the proper rate of interest in this case would be ascertained by reference to the last Treasury bill auction before May 1, 1985. That rate should apply, with annual compounding, until the judgment has been satisfied.

The need to be concerned about determining the correct time for the "snapshot" of a market rate of interest is largely a result of the statutory scheme adopted in 1982. The referenced source of interest rates is a dynamic market that changes month by month. It matters, and depending on the volatility of the market, it may matter a lot that the proper point of time is used. Before the 1982 amendment of §1961, the statute incorporated by reference a source of interest rates that was highly stable. The federal statute referred to judgment interest rates of the states in which the federal courts sat.[39] The underlying rates were embedded in state statutory laws that, until recently, changed very infrequently. In application of the pre-1982 version of §1961, even in extended litigation, an issue was unlikely to arise concerning the correct date to look at state law. The statutory scheme was, for this function, not time-sensitive. Section 1961, in its current form, is quite time-sensitive.

Case law under the superseded form of §1961 was unlikely to contain precedents dealing with the proper time to refer to

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39. *See* note 9 *supra.*

interest rates set by state law. However, one significant decision did come down under that version of §1961. In the years before 1982, some state legislatures acted to amend their statutory rates to reflect better the actual time value of money. Oregon was one such state. As a result, in a case of extended litigation in federal court, it became necessary to decide the time for the "snapshot." The case was the Ninth Circuit decision holding that the period of interest on a judgment began as of the date of the verdict where the District Court had erred in granting judgment n.o.v. for defendant.[40] The Court of Appeals for the Ninth Circuit held that the proper time to look to state law was the time when judgment interest began to accrue rather than the later time when the controlling appellate judgment reversed the erroneous trial court judgment. *Turner v. Japan Lines, Ltd.* 702 F.2d 752 (9th Cir. 1983).[41]

The *Turner* rationale is fully applicable to §1961 as amended in 1982. Congress made no change in the language defining the moment of the proper "spanshot." Only the place at which to point the camera was revised. On the time to refer to the Treasury bill market under present law, therefore, *Turner* is on point. More decisions on the issue can be expected in the future because of the heightened time-sensitivity of §1961 in its current form. *Turner* is a sound construction of the law in the context of extended litigation. It should be followed.

(3) Transition Questions Presented When §1961 Was Amended

After Congress amended §1961 in 1982, ongoing cases in the federal courts eventually came to, or will come to conclusion, many with plaintiffs prevailing in actions for money judgments. In cases of an extended nature already concluded, interest on the judgments has been allowed for periods of time

40. This case was discussed at length in Part IIIA, at pp. 16-17 *supra.*

41. The *Turner* court considered the possibility of stepping up the rate of interest as of the date of change in state laws. Following what the court understood to be the state law on changing interest rates during the life of a judgment, the court declined to make this adjustment. *See* Annot., 41 A.L.R. 4th 694 (1985).

that extended back before the effective date of the amendment. The question inevitably arose whether and how the amended version of §1961 applied in extended litigation that reached ultimate conclusion on the merits-claims after October 1, 1982. That was the effective date of the Federal Courts Improvement Act of 1982, one section of which contained the amendment of §1961.[42]

(a) When §1961 as Amended Governs

Courts that have faced the contention that §1961 as amended governed allowance of interest on judgments in cases ongoing as of October 1, 1982, have concluded that the pivot point was *a* judgment date. Two possible judgment dates were considered in typical extended litigation cases. One was the ultimate and controlling judgment, typically a court of appeals judgment, that brought to a close controversy over issues related to the merits-claims. Alternatively, courts focused on the penultimate judgment, typically the trial court judgment that, whether affirmed or reversed, moved the merits-claim litigation toward its eventual conclusion. Most courts resolved the question by choosing the second alternative.

Arguments could be advanced for either choice. Section 1961(a), on its face, speaks of allowance of interest "on any money judgment in a civil case recovered in a district court." Even though controlling judgments are frequently decisions of appellate courts, those decisions are eventually made effective by mandates to district courts. For purposes of dating the

42. Description of October 1, 1982 as the effective date of the amendment of §1961 may be questionable. The amendment was a small appendage to the Federal Courts Improvement Act of 1982, which, principally, created a new federal appellate court, the Court of Appeals for the Federal Circuit, and modified the legislative charter of the Court of Claims. Pub.L. No. 97-164, Title I, 96 Stat. 55 (1982). It was, of course, imperative to have a specific date on which the new appellate court and the modified Court of Claims began to function. The effective date provision, Title IV, §402, would be most meaningful for that purpose.

effectiveness of statutory change, one could look to the kind of judgment mentioned in the statute.[43]

On the other hand, the amendment of §1961 had a remedial purpose of considerable importance.[44] Legislative procedures are slow to come to fruition. Impetus for reform of §1961 began long before 1982.[45] The consummated reform would be imple-

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43. For this purpose, the district court judgments entered after the courts of appeals mandates might have been more appropriate to consider than the district court judgments entered before appeal.

44. The Senate Report accompanying the bill that became the Federal Courts Improvement Act of 1982 gave this explanation of the purpose of the amendment of §1961:

> Section 302. Under current law, the interest rate granted on judgments during appeal is based on varying State laws and frequently falls below the contemporary cost of money. As a consequence, a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal.
>
> Section 302 amends 28 U.S.C. 1961 by setting a realistic and nationally [*sic*] rate of interest on judgments in the Federal courts. The provision would tie the post-judgment interest rate to the rate used by the Internal Revenue Service for delinquent taxes under 26 U.S.C. 6621. That rate is a composite of prime rates from throughout the country that is reviewed and revised periodically. Furthermore, by consolidating all the provisions for interest on judgments of Title 28 into this section, this rate becomes uniformly applicable to all litigation in the Federal courts.

S. Rep. No. 97-275, 97th Cong., 1st Sess. 30 (1981); *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 40. The bill was amended on the floor of Congress to substitute Treasury bill rates of interest for the composite of prime rates in the bill as reported. *See* 127 CONG. REC. 14,683, 14,699, 14,701 (1981).

45. President Carter formally proposed that §1961 be amended on February 27, 1979. In a Message to Congress, he offered a number of new measures to solve problems relating to administration of the federal courts. With respect to interest on judgments, he declared:

> Sometimes years pass between the time of an injury and the granting of a judgment. More years may pass while that judgment is appealed. Current federal law is ambiguous about whether and under what circumstances interest may be paid for the period prior to judgment, and permits unrealistically low as well as conflicting rates of interest while the decision is under appeal. Yet such interest may be essential in order to truly compensate the plaintiff or to avoid the unjust enrichment of the defendant . . . If a judgment on appeal is entered at a rate well below the prime interest rate, the losing party may well profit from the appeal.

H.R. Doc. No. 96-59, 96th Cong., 1st Sess. 4 (1979). More than three years passed before President Carter's initiative was enacted into law. The delay was associated with controversy over other aspects of the legislation that became the Federal Courts Improvement Act of 1982.

mented most quickly if the new act were held to govern when the ultimate controlling judgments came down after its effective date.

Ultimate resolution of all issues on the underlying merits-claims does not assure prompt payments by defendants. Considerable time may elapse before any money judgment is satisfied. In 1983, the United States recovered a money judgment to renew a 1969 judgment. Renewal was necessary in order to levy on defendant's property, since the judgment lien on the prior judgment, though not the monetary obligation of the judgment, had expired. The Court of Appeals for the Second Circuit upheld the new judgment and directed that it bear interest under the current version of §1961. *United States v. Hannon,* 728 F.2d 142 (2d Cir. 1984).[46]

For any period of time, long or short, after an ultimate judgment entered after October 1, 1982, the rate of interest should be that fixed under the 1982 version of §1961. Given that current law applies with respect to judgment interest from the date of a current judgment to the future date of payment, the same rate should apply to the entire period of interest on the judgment. The statutory scheme of §1961 clearly contemplates one rate of interest for the whole period of judgment interest. It follows that the rate on judgments in extended litigation that concludes after 1982 should be established under §1961 as amended.

Precedent for choice of the ultimate controlling judgments as the pivotal time for applying §1961 as amended in ongoing

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46. *Hannon* involved considerable unpaid interest that had accrued on the 1969 judgment. For purposes of the 1983 judgment, this unpaid post-judgment interest became pre-judgment interest. The Court of Appeals left open for the lower court whether, in calculating the pre-judgment interest, effect should be given to the amendment of §1961 in 1982. 728 F.2d at 145-146 n.7.

cases is found in the implementation of analogous provisions in the Federal Rules of Civil Procedure, promulgated in 1938.

Rule 54 significantly altered the law then extant regarding taxation of costs. The Rules became effective on September 1, 1938. Two weeks later, the Court of Appeals for the Ninth Circuit issued a controlling judgment reversing a lower court decision for plaintiff in an income tax controversy. *Welch v. Solomon,* 99 F.2d 41 (9th Cir. 1938). On remand, costs were taxed pursuant to Rule 54(d), which the lower court held was the current and, therefore, the governing law. *Solomon v. Welch,* 28 F. Supp. 823 (S.D. Cal. 1939).

In a case pending on appeal in the Eighth Circuit at the time of the effective date of the amendment to §1961, the lower court had awarded plaintiffs attorneys' fees and costs but had denied interest on the award. The Court of Appeals held that interest should have been granted on the award and directed that interest be computed at the rate of amended §1961 for the full period of interest. The controlling judgment regarding interest was that of the Court of Appeals. The law in effect when that judgment was entered was the amended version of §1961. The Court of Appeals said: "It is the law now, and should be used by the District Court." *R. W. T. v. Dalton,* 712 F.2d 1225, 1235 (8th Cir.), *cert. denied,* 464 U.S. 1009 (1983).[47]

After the amendment of §1961, most Courts of Appeals chose the date of the penultimate district court judgments as the pivotal date. These courts held that the law that governed interest on judgments was the law in effect at the time of the lower courts' judgments. The doubtful quality of the advocacy in these cases and the absence of overt consideration by the courts of the alternative theory, that the pivotal judgment was the ultimate judgment, make it questionable whether the decisions are properly characterized as holdings. Many of the cases were

47. *See also* Bradley v. School Board, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed.2d 476 (1974) (application of Attorney's Fees Awards Act of 1976 to case pending on appeal when the Act took effect).

complicated by failure of plaintiffs to bring the 1982 amendment to the attention of the courts in timely fashion.[48]

Most of these Court of Appeals' decisions were affirmances or substantial affirmances of the judgments of the courts below. In that circumstance, it is less clear that the court of appeals' action was the controlling judgment than in cases where the appellate court has reversed or modified a judgment of the court below.

Illustrative of courts that chose the penultimate judgment as the pivotal date is a Second Circuit decision in a private antitrust case. The case was on appeal when §1961 was amended. The appeal concluded with the Court of Appeals affirming judgment for the plaintiff. After denial of certiorari by the Supreme Court and remand to the trial court, plaintiff for the first time sought to have the rate of interest of amended §1961 applied. As the briefs make clear, counsel assumed that the date of the District Court judgment controlled, but agrued for retrospective application of the amendment. The District Court denied the request and the Court of Appeals affirmed. *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 746 F.2d 168 (2d Cir. 1984). Both courts applied the rate of interest on judgments in effect when the trial court had entered its final judgment for plaintiff before October 1, 1982.

In two Fifth Circuit cases, trial court judgments for plaintiffs entered before §1961 was amended were substantially affirmed after the amendment. Further trial court proceedings were necessary in both cases. In the first case, this led to modification of the percentages of negligence in a comparative

48. In some instances, counsel first raised the point after the principal amount of the judgment and interest on the judgment had been paid. United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co., 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd,* 729 F.2d 1450 (3d Cir. 1984); *and see* International Telemeter Corp. v. Hamlin International Corp., 754 F.2d 1492 (9th Cir. 1985). In other cases, counsel never relied on the amendment to §1961; the courts *sua sponte* took note of the amendment and found it inapplicable. Peterson v. Crown Financial Corp., 553 F. Supp. 114, 116-117 n.4 (E.D. Pa. 1982); United States v. Dollar Rent A Car Systems, Inc., 712 F.2d 938, 940 n.5 (4th Cir. 1983).

negligence allocation. In the second, the further consideration did not result in any change of the amount of the judgment. In both cases the rate of interest under the old version of §1961 was held to apply, but only for the time that elapsed during the appeals of the original judgments. The opinions indicated that the §1961 amendment would apply thereafter. *Brooks v. United States,* 757 F.2d 734 (5th Cir. 1985); *Reaves v. Ole Man River Towing, Inc.,* 761 F.2d 1111 (5th Cir. 1985).

Without explanation and by a *per curiam* opinion, the Court of Appeals for the Seventh Circuit held that the law in effect at the time of a lower court's erroneous judgment applied to determine the rate of interest recoverable by plaintiffs. The Court of Appeals had issued the controlling judgment, directing that the District Court enter judgment for plaintiffs on an arbitration award which the lower court had refused to confirm. Although the Court of Appeals' judgment was made in 1984, that court declared that the date of the lower court's judgment governed. *Merit Insurance Co. v. Leatherby Insurance Co.,* 728 F.2d 943 (7th Cir. 1984).

In a Third Circuit case, the 1982 amendment took effect after the Court of Appeals had reversed a trial court judgment and remanded for further proceedings. The timing differed from the prior cases in which the appellate courts' decisions were rendered after October 1, 1982. The District Court concluded those further proceedings after the amendment was in effect. Because of the extended litigation, plaintiff was held entitled to interest on the judgment beginning in July 1979, the date of the District Court's prior erroneous judgment. Plaintiff did not contend that the interest should be calculated under §1961 as amended.[49] The District Court, *sua sponte,* noted the new law but stated that the law in effect at the time of the 1979 judgment governed. *Peterson v. Crown Financial Corp.,* 553 F. Supp. 114, 116-117 n.4 (E.D. Pa. 1982).[50]

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49. Plaintiffs sole strategy was to seek to have the period of pre-judgment interest brought forward to the current proceeding.

50. In another district court proceeding in the Third Circuit, a petition for certiorari from a Court of Appeals' decision in May 1982 was denied by the Supreme Court in October 1982, a few days after the amendment to §1961 took effect. No further proceedings were required in the District Court. After defendant had paid the judgment and interest on the judgment, plaintiff sought additional interest under §1961 as amended. Plaintiff contended that the date of the Supreme Court's denial of certiorari was sufficient to bring the judgment under the new version §1961 for purposes of the rate of interest. The District Court denied the request for additional interest. United States ex rel. Billows Electric Supply Co. v. E. J. T. Construction Co., 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd,* 729 F.2d 1450 (3d Cir. 1984)

None of the courts basing their choice of law on earlier district court judgments addressed the pernicious consequence of failure to give prompt effect to §1961 as amended. The rates of interest on judgments applicable under the pre-1982 version of the §1961 could be and often were very low relative to rates of interest prevailing in the market place. Section 1961 was amended to correct a mischief which, among other things, induced defendants to try to prolong litigation. Panels of the Second Circuit had angrily declared in several appeals that defendants' sole reasons for appeal were to obtain the benefit of the difference between time value of money in the market place and the rate of interest on judgments. *Bankers Trust Co. v. Publicker Industries, Inc.,* 641 F.2d 1361, 1367 (2d Cir. 1981); *Brady v. Chemical Construction Corp.,* 740 F.2d 195, 202 (2d Cir. 1984). The *Litton—Merit Insurance Co.* position diluted the effectiveness of the legislature's response to a manifest problem.[51] The Fifth Circuit, by limiting the time to which the old interest rate would apply, alleviated to some extent the harm to the parties and to the judicial system.

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51. Remarkably, the Second Circuit in *Litton* cited *Brady,* without noting this aspect of the decision. 746 F.2d at 176. The failure of the Second Circuit panel in *Litton* to take account of the deleterious effect of delayed implementation of an important reform may be explained by the fact that, at the time of its decision, the defendant had already paid the judgment. *See* 746 F.2d at 170 n.3. However, the *Merit* Insurance Co. litigation continued. For a vehement opinion dismissing a later appeal by defendant, *see* Merit Insurance Co. v. Leatherby Insurance Co., 737 F.2d 580 (7th Cir.), *cert. denied,* _____ U.S. _____, 105 S. Ct. 297 (1984). *And see* Note, *The Post-Judgment Interest Rate in Pennsylvania: Ignoring Reality Too Long,* 23 DUQUESNE L. REV. 1083 (1984).

(b) Effect of 1982 Amendment on Judgments Governed Initially by the Prior Version of §1961

When §1961 was amended, effective October 1, 1982, many judgments entered before that date were still unsatisfied. Some were unsatisfied because the judgments had been stayed pending the conclusion of ongoing litigation. As noted in the previous section, a number of courts, after the litigation had run its course, held that the pre-1982 version of §1961 applied to fix the rate of interest on the judgments. Several courts, having concluded that the prior version of §1961 governed the judgments as entered, held that the rate of interest would step up, as of October 1, 1982, to a rate ascertained by application of §1961 as amended.

The Court of Appeals for the Second Circuit suggested this should occur, but left the matter open for the District Court to decide. *United States v. Hannon*, 728 F.2d 142, 145-146 n.7 (2d Cir. 1984) (1969 judgment). In a later case, however, the Court of Appeals held that the amendment of §1961 could not sensibly be construed to increase rates on pending judgments as of its effective date because the amendment was a change in the method of ascertaining the rate, not a change in rate, and because a change in the interest rate midway in the period of accrual of interest was inconsistent with the statutory provision that tied the applicable rate of interest to the date of judgment. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984).

The Court of Appeals for the Ninth Circuit disagreed and ordered that the interest rate on a judgment, pending when §1961 was amended, be shifted to the rate determined by the amended provision. The case was an extended private antitrust action in which plaintiff finally prevailed in 1984. Because of the delay caused by the case having been tried to a jury twice and appealed several times, the court determined that interest on the judgment would begin in 1976, the date of the first verdict. From that date to October 1, 1982, the judgment bore interest under the old version of §1961, which borrowed the rate

applicable under state law. On the effective date of the amendment, the rate of interest was fixed pursuant to the formula in §1961 as amended. *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1984).[52]

As previously noted, the Court of Appeals for the Fifth Circuit, while not using October 1, 1982, as the pivot, held in two cases that the new version of §1961 would apply to unsatisfied judgments at some point thereafter. That court allowed the pre-1982 version to apply for the full time of one stage of extended litigation that straddled October 1, 1982. *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

A number of other courts rendered decisions in which a change from the old version of §1961 to the new could have been considered, but the opinions give no indication that either the parties or the court thought of the possibility. *See, e.g., United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938 (4th Cir. 1983); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943 (7th Cir. 1984); *Peterson v. Crown Financial Corp.*, 553 F. Supp. 114 (E.D. Pa. 1982); *see also United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1450 (3d Cir. 1984).

Handgards demonstrated the feasibility of adapting an open judgment to a new rate of interest. *Litton's* doubts, whatever they may have been, were soluble. Adaptation is not only feasible, but affirmatively desirable to bring into force as promptly as possible the reform of the law embodied in the new legislation. Sub-market rates of interest distort the dynamics of litigation and deprive the courts of the power to grant an effective restitution remedy that transfers benefits obtained by defendants to compensate plaintiffs for losses suffered. Section 1961, as amended in 1982, adopts a conservative, standard

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52. In addition to shifting the rate of interest as of the effective date of the amendment to §1961, the courts in *Handgards* utilized different sums as the principal in the two periods of interest calculation. For discussion of the questionable use of two principal amounts, *see* text at p. 23 *supra*.

measure of the benefits/losses that consciously understates the time value of money in credit transactions involving ordinary business entities. Prompt implementation of the reformed measure of the remedy is sound judicial policy.

CONCLUSION

Federal law on judgment interest has emerged as a major issue of remedies. During the past fifteen years, Congress and the courts have acted to define the remedy of interest on money judgments to meet the circumstance of a sharp rise in the time value of money. The governing statute and court rule continue the historic principle that the remedy of judgment interest serves the elementary goal of restitution: neither party should obtain a benefit or suffer a loss because of the extended time necessarily required for litigation to run its course. The extraordinarily high level of the time value of money in recent years has led the parties and the courts to examine with greater care the dimensions of the remedy of judgment interest, a question treated more or less perfunctorily in the past. The concern has been greatest in litigation extended in time.

In cases where extensive time has elapsed in resolution of the merits-claims being litigated, the corollary remedy of judgment interest has been articulated with the timing of decisions regarding those underlying claims. When the amount of recovery on an underlying claim is no longer subject to adjustment for the time value of money, the period for judgment interest begins. In extended litigation, this often requires that judgment interest accrue during post-verdict or post-finding proceedings and during periods of appellate review.

The rate of interest on judgments, historically fixed by law at a rate above prevailing marketplace rates by use of "legal interest" or the equivalent, now tracks marketplace rates through monthly auctions of Treasury bills.

Interest on judgments has moved into the forefront of remedial law. The elements of a federal law responsive to the new economic climate are already in place. A coherent, principled and sound analysis of the remedy is now clearly evident in the analyses of the courts.

APPENDIX

**ADMINISTRATIVE OFFICE OF THE
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June 22, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Circuit Executives

SUBJECT: Post-Judgment Interest

Pursuant to the provisions of §302 of the Federal Courts Improvement Act of 1982, P.L. 97-164, signed April 2, 1982, and effective October 1, 1982, post-judgment interest on most civil money judgments will be computed at a new, and varying rate.

Present law, 28 U.S.C. §1961, ties interest rates on money judgments in the district courts (except tax cases) to the rates allowable under state law. Section 2411 provides that in United States cases, except tax cases, the rate is 4%. Tax cases carry a rate of interest set yearly by the Secretary of Treasury—currently 20%.

The purpose of the amendments is to set a realistic national rate, which will adapt to market conditions, thereby eliminating a major incentive for the filing of otherwise inappropriate appeals. The Judicial Conference has supported such a change for a number of years.

Initially, language in the various bills would have adopted for all cases the rate set for tax cases under 26 U.S.C. §6621. This rate is currently 20% due to very high interest rates in 1981 and will not be readjusted until February 1983. The Office of Management and Budget pointed out the high costs to the United States that this rate would cause, and noted that it does not change sufficiently often to reflect market conditions.

As a result, on December 8, 1981, Senator Grassley offered as an amendment on the Senate floor, the basic substance of the new provisions. Later refinements in language were made. For convenience, the full text of the amended sections, as they will read, is set out as an addendum.

The provisions of new section 1961 will apply in the district courts, to United States cases as well as private actions, but will not be applicable in the bankruptcy courts. This section will govern also the rate of interest on judgments of the Court of Appeals for the Federal Circuit. This provision is somewhat unusual for a Circuit Court, but is necessary since it will hear cases arising form the Court of International Trade, the Claims Court, a number of quasi-judicial boards and various executive agencies. Separate provisions are also made for United States Claims Court judgments.

The first questions to arise are, of course, the practical ones of what is the rate, how is it ascertained, when is it set, when the information becomes available and the like. We shall try to answer all of these as well as the initial legal questions.

The Treasury Department holds an auction of 52-week Treasury Bills every four weeks; therefore the rate will change thirteen times a year. The dates are set in advance, so that we now understand that the auction results of the September 30, 1982 auction will be initially applicable on October 1, 1982, the effective date of section 302. This assumes that Congress raises the debt limit sufficiently that an auction can be held. The precise rate will be certified to the Director of the Administrative Office by the Treasury after each auction. We are already receiving the certifications, so even if that particular auction were not held we will have certification of the applicable rate.

The Treasury Department also issues a press release which is usually carried in the Wall Street Journal and in some other papers. This reported rate may be difficult to locate. The Treasury press release calls this the "Investment Rate (Equivalent Coupon-issue Yield)." The financial press may use either name or may not report it at all. This rate must not be confused

with the average "annual investment *yield*—which is an entirely different rate used for purposes of the All-Savers Certificates.

At the request of the Director of the Administrative Office, the Treasury Department's recorded message reporting results of the most recent auctions of the 13, 26, and 52-week Treasury bills has been augmented to include the information the courts will need. That recording is reached by calling (202) 287-4100, in the Bureau of the Public Debt. The recording carries the "Equivalent Coupon-issue Yield" as such.

Judges, and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change, even though a subsequent auction is held before the money is paid into the court, or the judgment is otherwise satisfied.

Although the matter will not arise in a specific case until late October, we deem it important to answer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee, et al v. F.E.C. et al,* United States Supreme Court, 80-1481, decided March 8, 1982, citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain and ordinary meaning of the words of the legislature, before looking further afield.

For our purposes here, the language of the statute contains sufficient specificity that we must conclude that the court looks first at the *date* of the judgment, not its hour of signing.Then, a simple check of the calendar will reveal the date of the *last* auction *before* that date. By referring to the date of the judgment, rather than simply to the judgment, which would have raised the question of computation of time, both for events such as auctions, and time periods within which actions are to be taken, the Congress has made it clear that one is to consider the judgment as in existence for this purpose, on all of the day on which it is rendered. The usual rules as to the "date of

judgment" are applicable here. (See Rule 85 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate of the preceeding [*sic*] auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations,—either of which give the same result, could be used. (Watch out for calculator discrepancies due to dropping of digits!)

$$1.\quad \frac{\text{Equivalent coupon-issue yield}}{365\text{ (days)}} \times \text{amount of judgment} \times \text{(number of days interest has run.)}$$

Example, given a rate of 14.26%:

$$\frac{.1426}{365} \times \$20{,}000.00 \times 12\text{ (days)} = \$96.13$$

$$2.\quad \frac{\text{Equivalent coupon-issue yield} \times \text{amount of judgment}}{365\text{ (days)}} \times \text{(number of days interest has run.)}$$

Example, given a rate of 14.26%:

$$\frac{.1426 \times \$20{,}000.00}{365} \times 12\text{ (days)} = \$96.13$$

If the interest is to be compounded, due to a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment, then add that interest amount to the amount of the original judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to answer any other questions this topic generates.

Sincerely,

/s/
Carl H. Imlay
General Counsel

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544**

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 27, 1982

MEMORANDUM TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Court Executives

SUBJECT: Post-Judgment Interest—
Our Memorandum of June 22, 1982

I. Effective Date

There have been several recent inquiries to this office as to the interest rate which should apply to judgments entered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (section 302(a), amending 28 U.S.C. § 1961). It is our view that the new rate will apply only to judgments entered on or after that date. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

II. Correction to Prior Memorandum

We have been advised that many small hand-held calculators will drop any digits more than two places to the right of the decimal point—thus giving different answers to the two equations contained in our June 22nd memorandum. Because the daily interest rate computed under equation #1 will be a very small number, it may be easier to use equation #2 on any hand-size calculators. If you get different answers depending upon whether you use equation #1 or equation #2, the problem is in the calculator.

The difficulty of assuring accuracy in the calculation of interest is illustrated by errors on page 4 of our memorandum, in which the assumed interest rate in both equations was shown as 14.26 percent but should have read 14.62 percent. Please substitute the two attached pages for pages three and four of the June 22nd memorandum.

It seems advisable to emphasize again that in most cases the parties should be expected to perform the calculations of the applicable interest rate. This information is being provided so that judicial officers and employees can be responsive to questions on this issue.

Sincerely

/s/

CARL H. IMLAY
General Counsel

Enclosures

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of title 28, United States Code, and section 1302 of the Act of July 27, 1956 (31 U.S.C. § 724a), and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

* * *

28 U.S.C. § 2411. Interest

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

* * *

28 U.S.C. § 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only

under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid, from the date of the filing of the transcript of the judgment in the General Accounting Office to the date of the mandate of the affirmance, at a rate of interest equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed.

* * *

31 U.S.C. § 724a. Appropriations for payment of judgments and compromise settlements against United States

There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may on and after July 27, 1956 be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements (not in excess of $100,000, or its equivalent in foreign currencies at the time of payment, in any one case) which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28, together with such interest and costs as may be specified in such judgments or otherwise authorized by law: *Provided*, That, whenever a judgment of a district court is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): *Provided further*, That whenever a judgment rendered by the Courts of

Appeals for the Federal Circuit or the United States Claims Court is payable from this appropriation, interest payable thereon in accordance with section 2516(b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office: *Provided further*, That any judgment or compromise settlement against the United States arising out of an express or implied contract entered into by the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration, shall be paid in accordance with this section and sections 2414, 2517, and 2518 of Title 28, and such instrumentality shall reimburse the United States for a judgment or compromise settlement paid by the United States. Notwithstanding the other provisions of this section, judgments against the United States arising out of activities of the United States Postal Service shall be paid by the Postal Service out of any funds available to it.

Judges and clerks of court will be advised by the Administrative Office of the officially certified rate.

Once the rate has been established for a particular judgment, that rate will not change even if a subsequent auction should be held before the money is paid into the court or the judgment otherwise satisfied.

Although the matter will not arise in a specific case until later October, we deem it important to anwer now, before problems occur, the question of what interest rate will be applicable to a judgment entered on the same day as the auction.

As the Supreme Court most recently pointed out in the case of *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. ____, 102 S.Ct. 1235 (1982), citing its prior decisions, the analysis of an issue of statutory construction begins with the language of the statute itself. Certainly one must start with the plain ordinary meaning of the words of the legislature before looking farther afield.

The language of this statute contains sufficient specificity that we conclude the court should be guided first by the *date* of the judgment, disregarding its hour of signing. Then, a simple check of the calendar will reveal the date of the *last* auction

before that date. By referring to the date of the judgment (rather than simply to "the judgment," which would have raised the question of computation of time, both for events such as auctions, and time periods within which actions are to be taken) the Congress has established that the judgment is to be treated as in existence on the whole day upon which it was rendered. The usual rules as to the "date of judgment" are applicable here. (See Rule 58 and Rule 79, Federal Rules of Civil Procedure.)

I conclude that the plain language of the law requires that the interest rate on judgments entered on the same day as an auction of 52-week Treasury bills is the rate as of the preceding auction.

While in most cases the parties themselves will perform the calculations, questions will inevitably arise to be presented to the Clerk's Office. One question may well be what the statute means when it says that the interest is *computed* daily but *compounded* annually. Either one of the following two equations, both of which give the same result, may be used. (Watch out for calculator discrepancies due to dropping of digits.)

1. $\dfrac{\text{Equivalent coupon-issue yield}}{\text{365 (days)}} \times \text{(amt. of judgment)} \times \text{(no. of days interest has run.)}$

Example, given a rate of 14.62%:

$$\frac{.1462}{365} \times \$20{,}000.00 \times 12 \text{ (days)} = \$96.13$$

2. $\dfrac{\text{Equivalent coupon-issue yield} \times \text{amount of judgment}}{\text{365 (days)}} \times \text{(no. of days interest has run.)}$

Example, given a rate of 14.62%:

$$\frac{.1462 \times \$20{,}000.00}{365} \times 12 \text{ (days)} = \$96.13$$

If the interest is to be compounded on account of a delay in payment of one year or more, simply multiply the equivalent coupon-issue yield by the amount of the judgment and then add that interest amount to the amount of the original judgment. This gives you a new judgment amount to be inserted in the equation for the shorter time periods.

We will be most happy to try to answer any other questions this topic generates.

Sincerely,

/s/

CARL H. IMLAY
General Counsel

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF PHILADELPHIA :

I, Joseph A. Bonjorno, being duly sworn according to law, do depose and say as follows:

1. I was both President and a principal shareholder of Columbia Metal Culvert Company ("Columbia") from its formation to its dissolution and liquidation in 1980.

2. Columbia was plaintiff in the lawsuit against Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum and Chemical Sales, Inc., (hereinafter collectively referred to as "Kaiser") docketed in the United States District Court for the Eastern District of Pennsylvania as Civil Action number 74-122 (the "Lawsuit"). On May 30, 1980, after the dissolution and liquidation of Columbia, I and the other principal shareholders of Columbia were substituted as plaintiffs in the Lawsuit.

3. In April, 1977, I, on behalf of Columbia, entered into an agreement with Philadelphia National Bank ("PNB") to refinance a loan originally extended by PNB to Columbia. Under this refinancing agreement, the balance of the loan amount of $193,760.28 was payable by Columbia to PNB at an interest rate equal to 2.5 percent above PNB's daily prime rate, or 3 percent above PNB's average monthly commercial paper rate, whichever rate was greater, compounded monthly.

4. Because of financial reverses suffered as a result of Kaiser's business practices, which ultimately destroyed our business, neither I nor the other principal shareholders of Columbia could raise the funds necessary to pay off PNB's loan to Columbia until Kaiser paid the damages attributable to its acts on July 3, 1986.

5. Although I and the other principal shareholders of Columbia repeatedly attempted, from 1977 to 1986, to reach a settlement with PNB on its loan to Columbia, PNB always insisted on repayment of all outstanding principal and interest.

6. Accordingly, on September 2 and September 18, 1986, I and the other principal shareholders of Columbia paid PNB the principal balance of $193,760.28 on its loan to Columbia. Additionally, we paid PNB $444,867.30 in interest that had accrued on this loan from December, 1978 to September, 1986.

7. Between August, 1979 and August, 1980, interest on the balance due PNB ranged from a low of 14 percent to a high of 22.5 percent, compounded monthly. From August, 1980 to August, 1981, interest ranged from a low of 15 percent to a high of 23 percent, compounded monthly. From August, 1981 to August, 1982, interest ranged from a low of 17 percent to a high of 22.5 percent. Between February, 1983 and March, 1984, interest on the balance due PNB was calculated at a rate of 13.5 percent, compounded monthly. From April, 1984 through May, 1985, rates ranged from a low of 13 percent to a high of 15.5 percent, again compounded monthly. From June, 1985 through August, 1986, rates ranged from a low of 10 percent to a high of 12.5 percent, compounded monthly.

8. Indeed, the rates of interest paid by Columbia and its shareholders to PNB in the period from August, 1979 through September, 1986 were, almost without exception, higher than the 10.05 percent rate of interest on the judgment which I and the other shareholders of Columbia seek against Kaiser. Moreover, the interest Columbia and its shareholders paid to PNB was compounded on a monthly basis.

/s/
Joseph A. Bonjorno

Sworn to and subscribed
for me this 20th day of
October, 1986.

/s/
Notary Public
LINDA S. PILLION
Notary Public, Phila., Phila. Co.
My Commission Expires Nov. 7, 1988

AFFIDAVIT OF CHARLES J. O'DONNELL

COMMONWEALTH OF PENNSYLVANIA :
SS
COUNTY OF PHILADELPHIA :

Charles J. O'Donnell submits this Affidavit in support of Plaintiffs' claim for interest on the judgment under 28 U.S.C. §1961 and being duly sworn according to law deposes and says:

1. I, Charles J. O'Donnell, am Controller of Duane, Morris & Heckscher.

2. My job duties include overseeing all accounting and financial activities at Duane, Morris & Heckscher.

3. I have a BS in accounting from Drexel University and I am a Certified Public Accountant in Pennsylvania.

4. I have made certain calculations of the interest accruing on certain principal amounts in connection with Plaintiffs' brief in support of their claim for interest on the judgment under 28 U.S.C. §1961. These calculations are set forth in the computer printouts attached to this Affidavit as Exhibits "A" and "B". These printouts accurately reflect the calculations made by me as described in this Affidavit.

5. As reflected in Exhibit "A", I computed the interest on the sum of $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate, as supplied by Fidelity Bank, and compounding the interest monthly. The interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate, is $14,242,410.86. I then computed the interest on that sum, $14,242,410.86, from July 4, 1986 through October 22, 1986, using the monthly average prime rate as supplied by Fidelity Bank and compounded monthly. The total interest on $14,242,410.86 from July 4, 1986 through October 22, 1986, is $336,890.91. Thus, the total interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, which is $14,242,410.86, plus the interest on

$14,242,410.86 from July 4, 1986, through October 22, 1986, which is $336,890.91, equals $14,579,301.77. This figure is the total interest amount reflected in Exhibit "A" using the monthly average prime rate and compounding the interest monthly.

6. As reflected in Exhibit "B", I also computed the interest on the principal $9,567,939.00 from August 16, 1979 through July 3, 1986, using the monthly average prime rate plus three points, which is the interest rate actually available to Plaintiffs during this period from PNB. The interest through July 3, 1986, is $19,631,680.13. The interest on $19,631,680.13 from July 4, 1986, through October 22, 1986, using the monthly average prime rate plus three points is $645,583.29. Thus, the sum of the interest on $9,567,939.00 from August 16, 1979 through July 3, 1986, and the interest on $19,631,680.13 from July 4, 1986, through October 22, 1986, is $19,631,680.13 plus $645,583.29, which equals $20,277,263.42.

7. I have reviewed Exhibit "A" and Exhibit "B" and they accurately reflect the calculations made by me as described in this Affidavit.

/s/
Charles J. O'Donnell

Sworn to and Subscribed
before me this 22nd day
of October, 1986.

/s/
Notary Public
Bernadette J. Scott
Notary Public, Phila., Phila. Co.
My Commission Expires July 16, 1988

Exhibit A

INTEREST AT PRIME RATE

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
16-Aug-79	9,567,939.00	11.91%	49,952.51	9,617,891.51
01-Sep-79	9,617,891.51	12.90%	101,976.00	9,719,867.51
01-Oct-79	9,719,867.51	14.39%	118,792.76	9,838,660.27
01-Nov-79	9,838,660.27	15.55%	125,746.16	9,964,406.43
01-Dec-79	9,964,406.43	15.30%	129,482.68	10,093,889.11
01-Jan-80	10,093,889.11	15.25%	130,736.60	10,224,625.71
01-Feb-80	10,224,625.71	15.63%	126,973.04	10,351,598.75
01-Mar-80	10,351,598.75	18.31%	160,977.29	10,512,576.04
01-Apr-80	10,512,576.04	19.77%	170,822.16	10,683,398.20
01-May-80	10,683,398.20	16.57%	150,349.07	10,833,747.27
01-Jun-80	10,833,747.27	12.63%	112,463.20	10,946,210.47
01-Jul-80	10,946,210.47	11.48%	106,727.05	11,052,937.52
01-Aug-80	11,052,937.52	11.12%	104,388.18	11,157,325.70
01-Sep-80	11,157,325.70	12.23%	112,154.05	11,269,479.75
01-Oct-80	11,269,479.75	13.79%	131,988.76	11,401,468.51
01-Nov-80	11,401,468.51	16.06%	150,499.38	11,551,967.89
01-Dec-80	11,551,967.89	20.35%	199,659.15	11,751,627.04
01-Jan-81	11,751,627.04	20.16%	201,213.61	11,952,840.65
01-Feb-81	11,952,840.65	19.43%	178,159.55	12,131,000.20
01-Mar-81	12,131,000.20	18.05%	185,969.89	12,316,970.09
01-Apr-81	12,316,970.09	17.15%	173,618.66	12,490,588.75
01-May-81	12,490,588.75	19.61%	208,031.61	12,698,620.36
01-Jun-81	12,698,620.36	20.03%	209,057.56	12,907,677.92
01-Jul-81	12,907,677.92	20.39%	223,529.15	13,131,207.07
01-Aug-81	13,131,207.07	20.50%	228,626.91	13,359,833.98
01-Sep-81	13,359,833.98	20.08%	220,492.16	13,580,326.14
01-Oct-81	13,580,326.14	18.45%	212,801.85	13,793,127.99
01-Nov-81	13,793,127.99	16.84%	190,912.01	13,984,040.00
01-Dec-81	13,984,040.00	15.75%	187,060.48	14,171,100.48
01-Jan-82	14,171,100.48	15.75%	189,562.73	14,360,663.21
01-Feb-82	14,360,663.21	16.56%	182,431.57	14,543,094.78
01-Mar-82	14,543,094.78	16.50%	203,802.55	14,746,897.33
01-Apr-82	14,746,897.33	16.50%	199,992.17	14,946,889.50
01-May-82	14,946,889.50	16.50%	209,461.20	15,156,350.70
01-Jun-82	15,156,350.70	16.50%	205,545.03	15,361,895.73
01-Jul-82	15,361,895.73	16.26%	212,145.68	15,574,041.41
01-Aug-82	15,574,041.41	14.39%	190,340.39	15,764,381.80

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Sep-82	15,764,381.80	13.50%	174,919.85	15,939,301.65
01-Oct-82	15,939,301.65	12.52%	169,489.36	16,108,791.01
01-Nov-82	16,108,791.01	11.85%	156,895.21	16,265,686.22
01-Dec-82	16,265,686.22	11.50%	158,868.96	16,424,555.18
01-Jan-83	16,424,555.18	11.16%	155,677.78	16,580,232.96
01-Feb-83	16,580,232.96	10.98%	139,655.53	16,719,888.49
01-Mar-83	16,719,888.49	10.50%	149,104.76	16,868,993.25
01-Apr-83	16,868,993.25	10.50%	145,581.72	17,014,574.97
01-May-83	17,014,574.97	10.50%	151,732.72	17,166,307.69
01-Jun-83	17,166,307.69	10.50%	148,147.59	17,314,455.28
01-Jul-83	17,314,455.28	10.50%	154,406.99	17,468,862.27
01-Aug-83	17,468,862.27	10.89%	161,570.23	17,630,432.50
01-Sep-83	17,630,432.50	11.00%	159,398.43	17,789,830.93
01-Oct-83	17,789,830.93	11.00%	166,200.89	17,956,031.82
01-Nov-83	17,956,031.82	11.00%	162,342.21	18,118,374.03
01-Dec-83	18,118,374.03	11.00%	169,270.29	18,287,644.32
01-Jan-84	18,287,644.32	11.00%	170,851.69	18,458,496.01
01-Feb-84	18,458,496.01	11.00%	161,322.20	18,619,818.21
01-Mar-84	18,619,818.21	11.21%	177,275.97	18,797,094.18
01-Apr-84	18,797,094.18	11.93%	184,314.52	18,981,408.70
01-May-84	18,981,408.70	12.39%	199,741.62	19,181,150.32
01-Jun-84	19,181,150.32	12.60%	198,643.15	19,379,793.47
01-Jul-84	19,379,793.47	13.00%	213,974.16	19,593,767.63
01-Aug-84	19,593,767.63	13.00%	216,336.67	19,810,104.30
01-Sep-84	19,810,104.30	12.97%	211,181.14	20,021,285.44
01-Oct-84	20,021,285.44	12.58%	213,915.09	20,235,200.53
01-Nov-84	20,235,200.53	11.77%	195,754.78	20,430,955.31
01-Dec-84	20,430,955.31	11.06%	191,916.64	20,622,871.95
01-Jan-85	20,622,871.95	10.61%	185,837.50	20,808,709.45
01-Feb-85	20,808,709.45	10.50%	167,609.88	20,976,319.33
01-Mar-85	20,976,319.33	10.50%	187,062.79	21,163,382.12
01-Apr-85	21,163,382.12	10.50%	182,642.89	21,346,025.01
01-May-85	21,346,025.01	10.31%	186,915.15	21,532,940.16
01-Jun-85	21,532,940.16	9.78%	173,089.44	21,706,029.60
01-Jul-85	21,706,029.60	9.50%	175,134.95	21,881,164.55
01-Aug-85	21,881,164.55	9.50%	176,548.03	22,057,712.58
01-Sep-85	22,057,712.58	9.50%	172,231.45	22,229,944.03
01-Oct-85	22,229,944.03	9.50%	179,362.15	22,409,306.18
01-Nov-85	22,409,306.18	9.50%	174,976.77	22,584,282.95
01-Dec-85	22,584,282.95	9.50%	182,221.13	22,766,504.08
01-Jan-86	22,766,504.08	9.50%	183,691.38	22,950,195.46

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Feb-86	22,950,195.46	9.50%	167,253.48	23,117,448.94
01-Mar-86	23,117,448.94	9.10%	178,669.38	23,296,118.32
01-Apr-86	23,296,118.32	8.83%	169,072.38	23,465,190.70
01-May-86	23,465,190.70	8.50%	169,399.39	23,634,590.09
01-Jun-86	23,634,590.09	8.50%	165,118.37	23,799,708.46
01-Jul-86	23,799,708.46	8.16%	10,641.40	23,810,349.86
03-Jul-86	23,810,349.86			

23,810,349.86 - 9,567,939.00 = 14,242,410.86 Interest through 7/3/86

04-Jul-86	14,242,410.86	8.16%	89,153.59	14,331,564.45
01-Aug-86	14,331,564.45	7.90%	96,158.91	14,427,723.36
01-Sep-86	14,427,723.36	7.50%	88,938.02	14,516,661.38
01-Oct-86	14,516,661.38	7.50%	62,640.39	14,579,301.77
22-Oct-86	14,579,301.77	7.50%		

Breakdown of Interest	
Interest on Judgement from 8/16/79 to 7/3/86	$14,242,410,86
Interest on interest of $14,579,301.77 from 7/4/86 to 10/22/86 ($14,579,301.77-14,242,410.86)	336,890.91
TOTAL	$14,579,301.77

Exhibit B

INTEREST AT PLAINTIFFS' BORROWING RATE: PRIME +3

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
16-Aug-79	9,567,939.00	14.91%	62,535.00	9,630,474.00
01-Sep-79	9,630,474.00	15.90%	125,855.78	9,756,329.78
01-Oct-79	9,756,329.78	17.39%	144,096.98	9,900,426.76
01-Nov-79	9,900,426.76	18.55%	150,947.60	10,051,374.36
01-Dec-79	10,051,374.36	18.30%	156,223.14	10,207,597.50
01-Jan-80	10,207,597.50	18.25%	158,217.76	10,365,815.26
01-Feb-80	10,365,815.26	18.63%	153,433.95	10,519,249.21
01-Mar-80	10,519,249.21	21.31%	190,386.88	10,709,636.09
01-Apr-80	10,709,636.09	22.77%	200,431.57	10,910,067.66
01-May-80	10,910,067.66	19.57%	181,337.28	11,091,404.94
01-Jun-80	11,091,404.94	15.63%	142,486.57	11,233,891.51
01-Jul-80	11,233,891.51	14.48%	138,155.32	11,372,046.83
01-Aug-80	11,372,046.83	14.12%	136,377.32	11,508,424.15
01-Sep-80	11,508,424.15	15.23%	144,060.25	11,652,484.40
01-Oct-80	11,652,484.40	16.79%	166,164.43	11,818,648.83
01-Nov-80	11,818,648.83	19.06%	185,148.04	12,003,796.87
01-Dec-80	12,003,796.87	23.35%	238,053.38	12,241,850.25
01-Jan-81	12,241,850.25	23.16%	240,798.87	12,482,649.12
01-Feb-81	12,482,649.12	22.43%	214,783.64	12,697,432.76
01-Mar-81	12,697,432.76	21.05%	227,005.75	12,924,438.51
01-Apr-81	12,924,438.51	20.15%	214,049.95	13,138,488.46
01-May-81	13,138,488.46	22.61%	252,298.57	13,390,787.03
01-Jun-81	13,390,787.03	23.03%	253,471.09	13,644,258.12
01-Jul-81	13,644,258.12	23.39%	271,049.73	13,915,307.85
01-Aug-81	13,915,307.85	23.50%	277,734.30	14,193,042.15
01-Sep-81	14,193,042.15	23.08%	269,240.07	14,462,282.22
01-Oct-81	14,462,282.22	21.45%	263,471.08	14,725,753.30
01-Nov-81	14,725,753.30	19.84%	240,130.64	14,965,883.94
01-Dec-81	14,965,883.94	18.75%	238,326.58	15,204,210.52
01-Jan-82	15,204,210.52	18.75%	242,121.85	15,446,332.37
01-Feb-82	15,446,332.37	19.56%	231,771.16	15,678,103.53
01-Mar-82	15,678,103.53	19.50%	259,655.17	15,937,758.70
01-Apr-82	15,937,758.70	19.50%	255,440.79	16,193,199.49
01-May-82	16,193,199.49	19.50%	268,186.00	16,461,385.49
01-Jun-82	16,461,385.49	19.50%	263,833.16	16,725,218.65
01-Jul-82	16,725,218.65	19.26%	273,587.92	16,998,806.57

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
01-Aug-82	16,998.806.57	17.39%	251,065.39	17,249,871.96
01-Sep-82	17,249,871.96	16.50%	233,936.62	17,483,808.58
01-Oct-82	17,483,808.58	15.52%	230,460.55	17,714,269.13
01-Nov-82	17,714,269.13	14.85%	216,211.15	17,930,480.28
01-Dec-82	17,930,480.28	14.50%	220,815.09	18,151,295.37
01-Jan-83	18,151,295.37	14.16%	218,292.95	18,369,588.32
01-Feb-83	18,369,588.32	13.98%	197,002.51	18,566,590.83
01-Mar-83	18,566,590.83	13.50%	212,879.95	18,779,470.78
01-Apr-83	18,779,470.78	13.50%	208,374.95	18,987,845.73
01-May-83	18,987,845.73	13.50%	217,709.96	19,205,555.69
01-Jun-83	19,205,555.69	13.50%	213,102.74	19,418,658.43
01-Jul-83	19,418,658.43	13.50%	222,649.55	19,641,307.98
01-Aug-83	19,641,307.98	13.89%	231,708.24	19,873,016.22
01-Sep-83	19,873,016.22	14.00%	228,675.80	20,101,692.02
01-Oct-83	20,101,692.02	14.00%	239,017.38	20,340,709.40
01-Nov-83	20,340,709.40	14.00%	234,057.48	20,574,766.88
01-Dec-83	20,574,766.88	14.00%	244,642.43	20,819,409.31
01-Jan-84	20,819,409.31	14.00%	247,551.33	21,066,960.64
01-Feb-84	21,066,960.64	14.00%	234,333.86	21,301,294.50
01-Mar-84	21,301,294.50	14.21%	257,080.36	21,558,374.86
01-Apr-84	21,558,374.86	14.93%	264,547.84	21,822,922.70
01-May-84	21,822,922.70	15.39%	285,246.53	22,108,169.23
01-Jun-84	22,108,169.23	15.60%	283,469.13	22,391,638.36
01-Jul-84	22,391,638.36	16.00%	304,280.89	22,695,919.25
01-Aug-84	22,695,919.25	16.00%	308,415.78	23,004,335.03
01-Sep-84	23,004,335.03	15.97%	301,955.53	23,306,290.56
01-Oct-84	23,306,290.56	15.58%	308,396.50	23,614,687.06
01-Nov-84	23,614,687.06	14.77%	286,675.83	23,901,362.89
01-Dec-84	23,901,362.89	14.06%	285,415.01	24,186,777.90
01-Jan-85	24,186,777.90	13.61%	279,579.27	24,466,357.17
01-Feb-85	24,466,357.17	13.50%	253,377.62	24,719,734.79
01-Mar-85	24,719,734.79	13.50%	283,430.38	25,003,165.17
01-Apr-85	25,003,165.17	13.50%	277,432.38	25,280,597.55
01-May-85	25,280,597.55	13.31%	285,781.57	25,566,379.12
01-Jun-85	25,566,379.12	12.78%	268,552.05	25,834,931.17
01-Jul-85	25,834,931.17	12.50%	274,274.95	26,109,206.12
01-Aug-85	26,109,206.12	12.50%	277,186.78	26,386,392.90
01-Sep-85	26,386,392.90	12.50%	271,093.08	26,657,485.98
01-Oct-85	26,657,485.98	12.50%	283,007.56	26,940,493.54
01-Nov-85	26,940,493.54	12.50%	276,785.89	27,217,279.43
01-Dec-85	27,217,279.43	12.50%	288,950.57	27,506,230.00

Date	Prior Balance	Average Prime Rate +3 Points	Interest Through END OF MONTH	Total
01-Jan-86	27,506,230.00	12.50%	292,018.20	27,798,248.20
01-Feb-86	27,798,248.20	12.50%	266,558.54	28,064,806.74
01-Mar-86	28,064,806.74	12.10%	288,413.95	28,353,220.69
01-Apr-86	28,353,220.69	11.83%	275,686.52	28,628,907.21
01-May-86	28,628,907.21	11.50%	279,622.07	28,908,529.28
01-Jun-86	28,908,529.28	11.50%	273,245.00	29,181,774.28
01-Jul-86	29,181,774.28	11.16%	17,844.85	29,199,619.13
03-Jul-86	29,199,619.13			

29,199,619.13 - 9,567,939.00 = 19,631,680.13 Interest through 7/3/86

04-Jul-86	19,631,680.13	11.16%	168,068.70	19,799,748.83
01-Aug-86	19,799,748.83	10.90%	183,296.85	19,983,045.68
01-Sep-86	19,983,045.68	10.50%	172,456.42	20,155,502.10
01-Oct-86	20,155,502.10	10.50%	121,761.32	20,277,263.42
22-Oct-86	20,277,263.42	10.50%		

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$19,631,680.13
Interest on interest of $19,631,680.13 from 7/4/86 to 10/22/86 ($20,277,263.42 - 19,631,680.13)	645,583.29
TOTAL	$20,277,263.42

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY,	:	CIVIL ACTION
vs.	:	NO. 74-122
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	

NOTICE OF APPEAL

Plaintiffs appeal to the United States Court of Appeals for the Third Circuit from the Order of the District Court dated April 11, 1988 awarding plaintiffs post-judgment interest in the amount of $2,632,886.30.

DUANE, MORRIS & HECKSCHER

By: /s/
Henry T. Reath
Michael M. Baylson
Edward G. Biester
Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, As Trustees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., Plaintiffs	:	CIVIL ACTION
vs.	:	NO. 74-122
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Defendants	:	

NOTICE OF CROSS-APPEAL

Defendants, Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. hereby cross-appeal to the United States Court of Appeals for the Third Circuit from the Order of the District Court dated April 11, 1988, awarding post-judgment interest to plaintiffs in the amount of $2,632,886.30.

/s/
RICHARD P. McELROY
ANN B. LAUPHEIMER

BLANK, ROME, COMISKY
& McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

OF COUNSEL:

Stephen B. Ringwood, Esq.

Kaiser Aluminum & Chemical Corp.
300 Lakeside Drive
Oakland, CA 94643
(415) 271-3209

DATED: May 11, 1988

COMMONWEALTH OF PENNSYLVANIA :
:
COUNTY OF PHILADELPHIA :

AFFIDAVIT OF CHARLES J. O'DONNELL

Charles J. O'Donnell submits this Affidavit in support of Plaintiffs' appeal in *Joseph A. Bonjorno, et al. v. Kaiser Aluminum & Chemical Corporation, et al.*, No. 88-1318 (3d Cir.), and being duly sworn according to law deposes and says:

1. I, Charles J. O'Donnell, am controller of Duane, Morris & Heckscher.

2. My job duties include overseeing all accounting and financial activities at Duane, Morris & Heckscher.

3. I have a B.S. Degree in Accounting from Drexel University and I am a certified public accountant in Pennsylvania.

4. I have made certain calculations of the interest on certain principal amounts in connection with Plaintiffs' Brief on appeal in support of their claim for interest on the judgment. My calculation are set forth in the computer printouts attached to this Affidavit as Exhibits A and B. These printouts accurately reflect the calculations made by me as described in this Affidavit.

5. As reflected in Exhibit A, I computed interest on the principal amount of $9,567,939 from August 16, 1979 through June 13, 1988, using the monthly average prime rate supplied by Fidelity Bank, compounded monthly, accounting for payment of $9,567,939 against the principal on July 3, 1986. Under these assumptions, the total amount due as of June 13, 1988 would be $17,080,036.78. Interest continues to run at a rate of $4,250 per day.

6. As reflected in Exhibit B, I computed interest on the principal amount of $9,567,939 from August 16, 1979 through June 13, 1988, using the federal T-Bill rate, as of

August 15, 1979, of \$10.05%, compounded *annually*, accounting for a payment against principal in the amount of \$9,567,939 on July 3, 1986. Under these assumptions, the total amount due as of June 13, 1988 would be \$10,823,335.65. Interest continues to run at a rate of \$2,851.37 per day.

7. I have reviewed Exhibits A and B to this Affidavit and they accurately reflect the calculations made by me as described in this Affidavit.

/s/ CHARLES J. O'DONNELL
Charles J. O'Donnell

Sworn to and Subscribed
before me this 13th day
of June, 1988.

/s/ KAREN A. GILLIAM
Notary Public
KAREN A. GILLIAM
Notary Public, Phila., Phila. Co.
My Commission Expires June 3, 1991

Exhibit A

INTEREST AT PRIME RATE

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
Principal				9,567,939.00
16-Aug-79	9,567,939.00	11.91%	50,529.57	9,618,468.57
01-Sep-79	9,618,468.57	12.90%	103,398.54	9,721,867.11
01-Oct-79	9,721,867.11	14.39%	120,491.42	9,842,358.53
01-Nov-79	9,842,358.53	15.55%	127,540.56	9,969,899.09
01-Dec-79	9,969,899.09	15.30%	131,381.22	10,101,280.31
01-Jan-80	10,101,280.31	15.25%	132,677.43	10,233,957.74
01-Feb-80	10,233,957.74	15.63%	128,826.21	10,362,783.95
01-Mar-80	10,362,783.95	18.31%	163,430.79	10,526,214.74
01-Apr-80	10,526,214.74	19.77%	173,419.39	10,699,634.13
01-May-80	10,699,634.13	16.57%	152,703.90	10,852,338.03
01-Jun-80	10,852,338.03	12.63%	114,220.86	10,966,558.89
01-jul-80	10,966,558.89	11.48%	108,427.76	11,074,986.65
01-Aug-80	11,074,986.65	11.12%	106,065.48	11,181,052.13
01-Sep-80	11,181,052.13	12.23%	113,953.56	11,295,005.69
01-Oct-80	11,295,005.69	13.79%	134,150.65	11,429,156.34
01-Nov-80	11,429,156.34	16.06%	152,960.21	11,582,116.55
01-Dec-80	11,582,116.55	20.35%	203,017.56	11,785,134.11
01-Jan-81	11,785,134.11	20.16%	204,646.91	11,989,781.02
01-Feb-81	11,989,781.02	19.43%	181,095.00	12,170,876.02
01-Mar-81	12,170,876.02	18.05%	189,219.80	12,360,095.82
01-Apr-81	12,360,095.82	17.15%	176,646.37	12,536,742.19
01-May-81	12,536,742.19	19.61%	211,757.66	12,748,499.85
01-Jun-81	12,748,499.85	20.03%	212,793.71	12,961,293.56
01-Jul-81	12,961,293.56	20.39%	227,639.21	13,188,932.77
01-Aug-81	13,188,932.77	20.50%	232,887.23	13,421,820.00
01-Sep-81	13,421,820.00	20.08%	224,591.79	13,646,411.79
01-Oct-81	13,646,411.79	18.45%	216,862.65	13,863,274.44
01-Nov-81	13,863,274.44	16.84%	194,547.95	14,057,822.39
01-Dec-81	14,057,822.39	15.75%	190,700.75	14,248,523.14
01-Jan-82	14,248,523.14	15.75%	193,287.69	14,441,810.83
01-Feb-82	14,441,810.83	16.56%	185,925.38	14,627,736.21
01-Mar-82	14,627,736.21	16.50%	207,883.17	14,835,619.38
01-Apr-82	14,835,619.38	16.50%	203,989.77	15,039,609.15
01-May-82	15,039,609.15	16.50%	213,736.53	15,253,345.68
01-Jun-82	15,253,345.68	16.50%	209,733.50	15,463,079.18
01-Jul-82	15,463,079.18	16.26%	216,557.56	15,679,636.74

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Aug-82	15,679,636.74	14.39%	194,331.16	15,873,967.90
01-Sep-82	15,873,967.90	13.50%	178,582.14	16,052,550.04
01-Oct-82	16,052,550.04	12.52%	173,094.32	16,225,644.36
01-Nov-82	16,225,644.36	11.85%	160,228.24	16,385,872.60
01-Dec-82	16,385,872.60	11.50%	162,291.49	16,548,164.09
01-Jan-83	16,548,164.09	11.16%	159,052.43	16,707,216.52
01-Feb-83	16,707,216.52	10.98%	142,636.25	16,849,852.77
01-Mar-83	16,849,852.77	10.50%	152,372.91	17,002,225.68
01-Apr-83	17,002,225.68	10.50%	148,769.47	17,150,995.15
01-May-83	17,150,995.15	10.50%	155,096.13	17,306,091.28
01-Jun-83	17,306,091.28	10.50%	151,428.30	17,457,519.58
01-Jul-83	17,457,519.58	10.50%	157,868.03	17,615,387.61
01-Aug-83	17,615,387.61	10.89%	165,213.21	17,780,600.82
01-Sep-83	17,780,600.82	11.00%	162,988.84	17,943,589.66
01-Oct-83	17,943,589.66	11.00%	169,991.56	18,113,581.22
01-Nov-83	18,113,581.22	11.00%	166,041.16	18,279,622.38
01-Dec-83	18,279,622.38	11.00%	173,175.02	18,452,797.40
01-Jan-84	18,452,797.40	11.00%	174,815.62	18,627,613.02
01-Feb-84	18,627,613.02	11.00%	165,036.21	18,792,649.23
01-Mar-84	18,792,649.23	11.21%	181,434.65	18,974,083.88
01-Apr-84	18,974,083.88	11.93%	188,634.02	19,162,717.90
01-May-84	19,162,717.90	12.39%	204,485.30	19,367,203.20
01-Jun-84	19,367,203.20	12.60%	203,355.63	19,570,558.83
01-Jul-84	19,570,558.83	13.00%	219,120.95	19,789,679.78
01-Aug-84	19,789,679.78	13.00%	221,574,33	20,011,254.11
01-Sep-84	20,011,254.11	12.97%	216,288.30	20,227,542.41
01-Oct-84	20,227,542.41	12.58%	219,158.63	20,446,701.04
01-Nov-84	20,446,701.04	11.77%	200,548.06	20,647,249.10
01-Dec-84	20,647,249.10	11.06%	196,672.22	20,843,921.32
01-Jan-85	20,843,921.32	10.61%	190,466.15	21,034,387.47
01-Feb-85	21,034,387.47	10.50%	171,730.88	21,206,118.35
01-Mar-85	21,206,118.35	10.50%	191,766.54	21,397,884.89
01-Apr-85	21,397,884.89	10.50%	187,231.49	21,585,116.38
01-May-85	21,585,116.38	10.31%	191,661.23	21,776,777.61
01-Jun-85	21,776,777.61	9.78%	177,480.74	21,954,258.35
01-Jul-85	21,954,258.35	9.50%	179,621.67	22,133,880.02
01-Aug-85	22,133,880.02	9.50%	181,091.27	22,314,971.29
01-Sep-85	22,314,971.29	9.50%	176,660.19	22,491,631.48
01-Oct-85	22,491,631.48	9.50%	184,018.26	22,675,649.74
01-Nov-85	22,675,649.74	9.50%	179,515.56	22,855,165.30
01-Dec-85	22,855,165.30	9.50%	186,992.56	23,042,157.86

Month	Prior Balance	Average Prime Rate	Interest Through END OF MONTH	Total
01-Jan-86	23,042,157.86	9.50%	188,522.46	23,230,680.32
01-Feb-86	23,230,680.32	9.50%	171,603.75	23,402,284.07
01-Mar-86	23,402,284.07	9.10%	183,406.02	23,585,690.09
01-Apr-86	23,585,690.09	8.83%	173,551.37	23,759,241.46
01-May-86	23,759,241.46	8.50%	173,924.93	23,933,166.39
01-Jun-86	23,933,166.39	8.50%	169,526.60	24,102,692.99
01-Jul-86	24,102,692.99	8.16%	10,892.03	24,113,585.02
03-Jul-86	24,113,585.02			
24,113,585.02 - 9,567,939.00 = 14,545,646.02 Interst through 7/3/86				
04-Jul-86	14,545,646.02	8.16%	92,295.49	14,637,941.51
01-Aug-86	14,637,941.51	7.90%	99,589.57	14,737,531.08
01-Sep-86	14,737,531.08	7.50%	92,109.57	14,829,640.65
01-Oct-86	14,829,640.65	7.50%	95,784.72	14,925,425.37
01-Nov-86	14,925,425.37	7.50%	93,283.91	15,018,709.28
01-Dec-86	15,018,709.28	7.50%	97,005.91	15,115,715.19
01-Jan-87	15,115,715.19	7.50%	97,632.48	15,213,347.67
01-Feb-87	15,213,347.67	7.50%	88,726.08	15,302,073.75
01-Mar-87	15,302,073.75	7.50%	98,836.17	15,400,909.92
01-Apr-87	15,400,909.92	7.73%	99,207.53	15,500,117.45
01-May-87	15,500,117.45	8.14%	108,659.47	15,608,776.92
01-Jun-87	15,608,776.92	8.25%	107,310.34	15,716,087.26
01-Jul-87	15,716,087.26	8.25%	111,662.47	15,827,749.73
01-Aug-87	15,827,749.73	8.25%	112,455.83	15,940,205.56
01-Sep-87	15,940,205.56	8.70%	115,566.49	16,055,772.05
01-Oct-87	16,055,772.05	9.07%	125,415.80	16,181,187.85
01-Nov-87	16,181,187.85	8.78%	118,392.36	16,299,580.21
01-Dec-87	16,299,580.21	8.75%	122,827.70	16,422,407.91
01-Jan-88	16,422,407.91	8.75%	123,753.28	16,546,161.19
01-Feb-88	16,546,161.19	8.51%	113,415.16	16,659,576.35
01-Mar-88	16,659,576.35	8.50%	121,953.21	16,781,529.56
01-Apr-88	16,781,529.56	8.50%	118,869.17	16,900,398.73
01-May-88	16,900,398.73	8.84%	128,665.35	17,029,064.08
01-Jun-88	17,029,064.08	9.00%	50,972.70	17,080,036.78
13-Jun-88	17,080,036.78			

Breakdown of Interest

Interest on Judgement from 8/16/79 to 7/3/86	$14,545,646.02
Interest on compound interest of $14,545,646.02 from 7/4/86 to 6/13/88 ($17,080,036.78 - 14,545,646.02)	2,534,390.76
TOTAL	$17,080,036.78

Exhibit B

INTEREST AT FEDERAL T-BILL RATE (8/15/79)

Period	Prior Balance	Rate	Interest Through End of Year (Period)	Total
Principal				9,567,939.00
16-Aug-79	9,567,939.00	10.05%	363,555.47	9,931,494.47
01-Jan-80	9,931,494.47	10.05%	998,115.19	10,929,609.66
01-Jan-81	10,929,609.66	10.05%	1,098,425.77	12,028,035.43
01-Jan-82	12,028,035.43	10.05%	1,208,817.56	13,236,852.99
01-Jan-83	13,236,852.99	10.05%	1,330,303.73	14,567,156.72
01-Jan-84	14,567,156.72	10.05%	1,463,999.25	16,031,155.97
01-Jan-85	16,031,155.97	10.05%	1,611,131.17	17,642,287.14
01-Jan-86	17,642,287.14	10.05%	888,953.76	18,531,240.90
03-Jul-86	18,531,240.90			

18,531,240.90 - 9,567,939.00 = 8,963,301.90 Interest through 7/3/86

04-Jul-86	8,963,301.90	10.05%	446,703.95	9,410,005.85
01-Jan-87	9,410,005.85	10.05%	945,705.59	10,355,711.44
01-Jan-88	10,355,711.44	10.05%	467,624.21	10,823,335.65
13-Jun-88	10,823,335.65			

Breakdown of Interest	
Interest on Judgment from 8/16/79 to 7/3/86	$ 8,963,301.90
Interest on compound interest of $8,963,301.90 from 7/4/86 to 6/13/88 ($10,823,335.65 - 8,963,301.90)	1,860,033.75
TOTAL	$10,823,335.65

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Appellants No. 88-1396

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND NYGAARD, *Circuit Judges*

The petitions for rehearing filed by appellants in No. 88-1318 and appellants in No. 88-1396 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

Judge Stapleton would have granted rehearing in banc for the reason set forth in his dissent. Judge Becker and Judge Hutchinson would also have granted rehearing in banc.

By the Court,

/s/
Circuit Judge

Dated: February 13, 1989

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 19, 1989

Mr. Richard P. McElroy
Blank, Rome, Comisky, McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Re: Kaiser Aluminum & Chemical Corporation, et al.,
v. Joseph A. Bonjorno, et al.
No. 88-1595
Joseph A. Bonjorno, et al.,
v. Kaiser Aluminum & Chemical Corporation, et al.
No. 88-1771

Dear Mr. McElroy:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/
Joseph F. Spaniol, Jr., Clerk

(6)

Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1595

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR (Executrix of the Will of GEORGE M. KERR, JR.), and BARBARA K. CLISBY,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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58 pp

QUESTIONS PRESENTED

In this private antitrust case, which was commenced in 1974, respondents ultimately secured a treble-damage judgment of $9,567,939 after several retrials and intervening appellate proceedings. After payment of the judgment, respondents claimed interest on the judgment under 28 U.S.C. § 1961, as amended in 1982. The 1982 amendment substituted for the various state court interest rates a uniform federal rate of interest on judgments keyed to United States Treasury bill auction prices. This case presents the following questions involving the application of this provision and broader issues of retroactive application of federal statutes:

1. Whether the Court below erred when it applied the 1982 amendment to 28 U.S.C. § 1961 retroactively to a judgment entered prior to its effective date where the legislative history and statutory language of the amended statute show that Congress intended that it only apply prospectively and where manifest injustice to Kaiser results from retroactive application?

2. Whether the Court below erred in using the presumption derived from *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), in favor of retroactively applying current law to a pending case, notwithstanding controlling authorities of this Court, recently reaffirmed in *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988), holding that an unqualified presumption exists that, in the absence of clear and unequivocal statutory language or legislative history to the contrary, legislation does *not* apply retroactively?

3. Whether 28 U.S.C. § 1961, which specifically provides that interest shall be calculated from the "date of entry of the *judgment*", may be construed to require the calculation of interest from the date of *verdict*?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

This statement is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court. Until it was merged into Petitioner Kaiser Aluminum & Chemical Corporation, Petitioner Kaiser Aluminum & Chemical Sales, Inc., was a wholly-owned subsidiary of Petitioner, Kaiser Aluminum & Chemical Corporation. As of August 3, 1989, Kaiser Aluminum & Chemical Corporation had the following parent companies:

Kaiser Aluminum & Chemical Corporation
Owned by: KaiserTech Limited
[44,898,914 shares]
Brown Brothers Harriman, Inc.
[406 shares]

KaiserTech Limited
Owned by KLU Holdings, Inc.

KLU Holdings, Inc.
Owned by MPI Investments, Inc.

MPI Investments, Inc.
Owned by MAXXAM Properties Inc.

MAXXAM Properties Inc.
Owned by MAXXAM Group Inc.

MAXXAM Group Inc.
Owned by MAXXAM Inc.

As of August 3, 1989, Kaiser Aluminum & Chemical Corporation had the following subsidiaries (excluding wholly-owned subsidiaries):

DOMESTIC
Alpart Farms (Jamaica) Ltd.
Alumina Partners of Jamaica
Delta America Insurance Co.
Delta Holdings, Inc.
Filtrol Corporation
Kaiser Center Properties
Kaiser Center Properties, Inc.

Kaiser Delaware, Inc.
Oakland City Center Hotel Company, Inc.
Queensland Alumina Security Corporation
Second Queensland Alumina Security Corporation

FOREIGN
Aluminium Products Company Limited
Anglesey Aluminium Limited
Anglesey Aluminum Construction Limited
Anglesey Aluminum Metal Limited
Boyne Smelters Limited
Hopewell International Insurance Ltd.
Kaiser Jamaica Bauxite Company
Queensland Alumina Finance N.V.
Queensland Alumina Holdings N.V.
Queensland Alumina Limited
Societe D'Etudes des Bauxites du Cameroun
Thai Metal Works Company, Ltd.
Tortuga Casualty Company
United Insurance Company
Volta Aluminium Company Limited

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OPINIONS BELOW

The Judgment of the Court of Appeals is set out in the Appendix to the Petition For A Writ Of Certiorari To The Court Of Appeals For The Third Circuit, (the "Petition") No. 88-1595, at P.A.1.* The Opinion of the Court of Appeals, dated January 9, 1989, is reported at 865 F.2d 566 (3d Cir. 1989), and is set out at P.A.3. The Order of the Court of Appeals denying rehearing and rehearing *in banc,* dated February 13, 1989, is set out at P.A.29. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), dated April 11, 1988, is set out at P.A.31.

JURISDICTION

The judgment of the Court of Appeals awarding postjudgment interest was entered January 9, 1989. (P.A.1). Kaiser's timely petition for rehearing and suggestion of rehearing *in banc* was denied by Order dated February 13, 1989, with a notation that Circuit Judges Becker, Stapleton and Hutchinson would have granted the petition for rehearing *in banc.* (P.A.29-30). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition was timely filed under 28 U.S.C. 2101(c) and Rules 20.2 and 20.4 of this Court. This Court, by Order dated June 19, 1989, granted the Petition and the Conditional Cross-Petition of Respondents, No. 88-1771. (J.A. 311).**

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1961 as it read prior to October 1, 1982 and amended 28 U.S.C. § 1961, which was enacted on April 2, 1982 and became effective on October 1, 1982.

Prior to its amendment in 1982, 28 U.S.C. § 1961 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor

---

* References to the Appendix to the Petition are cited herein as "P.A.____".

** References to the Joint Appendix are cited herein as "J.A.____".

> may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

As amended in 1982, Section 1961 now provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

A. Prior Trials And Prior Appeals On The Merits.

Columbia Metal Culvert Co., Inc. filed the Complaint in this case in 1974, charging Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") with violations of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1 and 2, Section 3 of the Clayton Act, 15 U.S.C. § 14, and Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a), as amended by the Robinson-Patman Act. The district court had subject matter jurisdiction over the substantive claim below pursuant to 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331, 1337. Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby ("respondents") were later substituted as plaintiffs when Columbia Metal Culvert Co., Inc. ceased operations. Following the death of George M. Kerr, Jr., Lorraine Kerr, Executrix of the Will of George M. Kerr, Jr., was substituted as a party by Order of the district court, dated March 29, 1989.

Respondents tried their claims to a jury beginning in April, 1977. At the conclusion of respondents' case, the district court granted motions for a directed verdict in Kaiser's favor on all counts of the Complaint and entered judgment accordingly. The Court of Appeals reversed and remanded the case for trial. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). The case was bifurcated on liability and damages and tried on remand in July, 1979 before the district court and a jury. On August 16, 1979, the jury returned a verdict for respondents on liability. (J.A. 87). A few days later, the same jury awarded damages in the amount of $1,815,000.00. (J.A. 90). The district court trebled the damage verdict, and on August 22, 1979 entered a judgment in the amount of $5,445,000.00. (J.A. 91). Nearly two years later, the district court, by Memorandum and Order dated June 18, 1981, granted Kaiser's judgment

n.o.v. motion, in part, with respect to a portion of the respondents' damage claim. In addition, the district court granted Kaiser's motion for a new trial, but only as to damages. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102 (E.D. Pa. 1981) (J.A. 92). The district court entered an Order vacating the August 22, 1979 damage judgment. (J.A. 128).

The new trial, limited to the issue of damages, was held in 1981. The jury returned a single damage verdict of $3,189,313.00 on December 2, 1981 (J.A. 145) and two days later, on December 4, 1981, the district court entered judgment in the trebled amount of $9,567,939. (J.A. 146). One year later, on January 17, 1983, the court granted Kaiser's motion for judgment n.o.v. as to a part of the damage award, vacated the December 4, 1981 judgment and entered judgment on January 18, 1983, in the trebled damage amount of $4,651,560. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983). (J.A. 147).

Respondents appealed from the part of the judgment granting defendants' motion for judgment n.o.v. on damages and Kaiser cross-appealed the liability issues. By Opinion dated December 27, 1984, the Court of Appeals for the Third Circuit reversed the district court's partial grant of judgement n.o.v. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984). (J.A. 185). The Court of Appeals ordered that the January 18, 1983 judgment be vacated and ordered that the district court reinstate the December 4, 1981 judgment in the amount of $9,567,939. (J.A. 210). This Court denied Kaiser's Petition For a Writ of Certiorari on June 23, 1986, with Justice White dissenting. 477 U.S. 908 (1986).

On July 1, 1986, the Court of Appeals remanded the case to the district court (J.A. 209) and on July 2, 1986, the district court reinstated the judgment on the docket. (J.A. 53-54). On July 3, 1986, Kaiser paid the judgment.

The following is a summary of the relevant dates for purposes of this case:

April 1977	First trial and directed verdict for Kaiser on all counts
May 24, 1978	Court of Appeals reversal as to Kaiser on Sherman Act claims only; remand for trial
August 16, 1979	Liability verdict for respondents
August 21, 1979	Damage verdict
August 22, 1979	Judgment entered on trebled damage verdict ($5,445,000)
June 18, 1981	JNOV granted on damages and August 22, 1979 judgment vacated, new trial on damages ordered
December 2, 1981	Jury damage verdict ($3,189,313)
December 4, 1981	Judgment entered on trebled jury verdict ($9,567,939)
October 1, 1982	Effective date of amended 28 U.S.C. § 1961
January 17, 1983	JNOV granted in part on damage verdict
January 18, 1983	Judgment entered ($4,651,560)
December 27, 1984	Court of Appeals reverses partial JNOV with respect to Sherman Act § 2 claim only
June 23, 1986	This Court denies Petition For Writ Of Certiorari filed by Kaiser
July 1, 1986	Remand from Third Circuit ordering reinstatement of December 4, 1981 judgment ($9,567,939)
July 2, 1986	Court of Appeals Order entered on district court docket
July 3, 1986	Kaiser pays the judgment

B. The 1982 Amendment To The Federal Postjudgment Interest Statute, 28 U.S.C. § 1961.

Until October 1982, 28 U.S.C. § 1961 provided that post-judgment interest "shall be calculated . . . at the rate allowed by state law." As the district court noted, "[p]ostjudgment interest was calculated at the rate established by the state in which the federal court sat; Pennsylvania's post-judgment interest rate was at all relevant times 6% simple interest." (P.A.41-42).

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982 (the "Act"), which included the amendment to § 1961 at issue here. Pub. L. No. 97-164, tit. III, pt. B, § 302, 96 Stat. 25, 55-56 (1982). The amendment changed the post-judgment interest rate to a uniform national interest rate "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment" (the "T-bill rate"). Under the amended statute, interest is compounded annually. In § 402 of the Act, Congress postponed for six months the Act's effective date, stating that, "[u]nless otherwise specified, the provisions of this Act shall take effect on October 1, 1982."

C. The Decision Of The District Court Concerning Post-judgment Interest.

On April 11, 1988, the district court awarded $2,632,886.30 in postjudgment interest to respondents. Applying the standard set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), the district court declined to apply the 1982 amendment to 28 U.S.C. § 1961 retroactively to a judgment entered prior to its effective date and, instead, applied that statute as it was in effect on December 2, 1981. The district court found that retroactive application of amended § 1961 in this case would result in manifest injustice to Kaiser. (P.A.45). Based in part on the fact that respondents represented to the Court of Appeals "that plaintiffs were entitled to interest only at the Pennsylvania legal rate both before and after" the effective date of amended

§ 1961, the district court found that "Kaiser had a right to rely on interest accruing at Pennsylvania's simple 6% rate." (P.A.46). In addition, the district found evidence, from the postponement of the effective date of the statute, that Congress did not intend that it apply retroactively. (P.A.46-48).

With respect to the date from which postjudgment interest should run, the district court rejected both parties' positions, holding that interest ran from December 2, 1981, the date of the damage *verdict* underlying the December 4, 1981 *judgment*. (P.A.41). Kaiser had argued that interest should not begin to accrue until the date the district court's judgment was reinstated on remand from the Court of Appeals in July, 1986. Respondents had argued that interest should run either from the 1979 liability verdict or from the 1979 vacated damage judgment.

D. The Decision Of The Court Below Concerning Postjudgment Interest.

On the question of retroactivity, a divided panel of the Court of Appeals, in an Opinion authored by Circuit Judge Cowen, also applied *Bradley*. However, the Court of Appeals reversed the district court's holding that the language of amended § 1961 and its legislative history indicated that it should apply only to judgments entered after its effective date. It found "ambiguous" Congress' move to postpone the effective date of amended § 1961. (P.A.19). It also reversed the finding of the district court that retroactive application of amended § 1961 would result in manifest injustice to Kaiser. The Court of Appeals focused on respondents' rights, rather than on Kaiser's rights, stating that respondents' "right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. . . ." (P.A.22).

Circuit Judge Stapleton dissented, explaining that he would confine the application of amended § 1961 to judgments entered after its effective date, relying on the reasoning of the Second Circuit in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984). Judge Stapleton found significant evidence from the terms of the statute that Congress did not

intend the amendment to be applied to judgments entered before its effective date. He said: "Given this focus on the date of the entry of judgment, I think it highly unlikely that Congress intended the post-judgment interest rate in a particular case to be retroactively altered in the event an appeal lasted beyond the effective date of the amendment." (P.A.27). Additionally, noting the fact that Congress postponed the effectiveness of this statute for six months, Judge Stapleton observed that "Congress chose to postpone for a very substantial period the relief it was affording to plaintiffs whom it perceived as being substantially undercompensated by prevailing state interest rates." (P.A.27). He therefore deduced that "Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates." (P.A.27).

The Court of Appeals affirmed the portion of the district court's decision which held that postjudgment interest should be calculated from the December 2, 1981 damage *verdict*, rather than from the date of the *judgment*, as the statute provides. Notwithstanding the fact that the "delay" between verdict and entry of a judgment was only two days, the Court of Appeals held that the district court "correctly revised its decision to conform with *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987), stating that interest is calculated from the date of the damage verdict underlying the appropriate judgment." (P.A.14).

Kaiser filed a petition for rehearing and suggestion of rehearing *in banc* for reconsideration of (1) the holding of the panel majority in light of this Court's December 12, 1988 decision in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), which reaffirmed the holding of *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), and which was not cited or distinguished in the panel majority's January 9, 1989 Opinion; (2) the holding of the panel majority in light of two prior conflicting decisions of the Court of Appeals for the Third Circuit; and (3) the panel majority's decision that *Bradley v.*

Richmond School Board, 416 U.S. 696 (1974), required application of the 1982 amendments to 28 U.S.C. § 1961 to a judgment entered prior to its effective date.

The petition for rehearing was denied by the Court of Appeals on February 13, 1989, with a notation that Judges Stapleton, Becker and Hutchinson would have granted rehearing *in banc*. (P.A.29).

Kaiser's motion for a stay of mandate pending application to this Court for a Writ of Certiorari was granted by the Court below, by Order dated February 27, 1989, staying the mandate until March 30, 1989.

Kaiser filed the Petition For A Writ Of Certiorari on March 30, 1989. Respondents filed their Conditional Cross-Petition For A Writ Of Certiorari on April 28, 1989. Both the Petition and the Conditional Cross-Petition were granted by this Court on June 19, 1989. (J.A.311).

E. The Effect Of The Decision Of The Court Of Appeals.

The district court's decision to calculate postjudgment interest from December 2, 1981 at the six percent simple interest rate prescribed by the pre-amendment version of 28 U.S.C. § 1961 resulted in postjudgment interest in the amount of $2,632,886.30.

The Court of Appeals' holding that amended § 1961 applied increased Kaiser's liability for postjudgment interest by more than $6 million to over $8.5 million. Moreover, because amended § 1961 calls for compound interest, under the Court of Appeals' holding, interest continues to run at a rate of thousands of dollars per day, even though Kaiser paid the judgment in full one day after the judgment was reinstated on the district court docket.

There is some uncertainty as to the precise amount of postjudgment interest that would be due under the T-bill rate. The uncertainty stems from an argument which respondents first raised after the decision of the Court of Appeals. According to respondents, the November 25, 1981 T-bill auction, which pursuant to amended § 1961 would trigger a change in the

appropriate interest rate, did not "settle" until December 3, 1981. Respondents argue that the "settlement" date, not the auction date, changes the applicable postjudgment interest rate.[1] The damage verdict in this case, which both the district court and the Court of Appeals chose to begin the accrual of postjudgment interest, was returned on December 2, 1981 and judgment was entered upon it on December 4, 1981. Respondents' present position is that the interest rate changed from 14.84 percent to 11.58 percent on December 3, 1981. If respondents' argument prevails, the interest owing on a December 2, 1981 damage verdict would be over $12 million, while on a December 4, 1981 judgment, the postjudgment interest would be under $9 million. Therefore, the decision to measure interest from the date of the *verdict*, rather than from the date of entry of *judgment*, is potentially a $4 million question of statutory construction.

If this Court reverses the decision below that amended § 1961 applies retroactively to judgments entered prior to its effective date, and instead holds that Pennsylvania's six percent simple interest rate applies, the choice between December 2, 1981 and December 4, 1981 is no longer a meaningful issue, as the difference in interest would be negligible in this case.

SUMMARY OF ARGUMENT

I.

Under the standard set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), the 1982 amendment to the federal postjudgment interest statute, 28 U.S.C. § 1961, should not be applied to the calculation of interest on judgments

1. Kaiser disputes respondents' position. The Administrative Office of the United States Courts, which is responsible for informing federal judges of the change in the § 1961 postjudgment interest rates, has considered the question and has concluded that the auction date is the appropriate date on which to change the postjudgment interest rate. (P.A.66). No court has ruled on this question. The Court of Appeals below declined to rule on this aspect of respondents' construction of the statute and remanded that issue to the district court for consideration in the first instance. (P.A.74).

entered prior to its effective date. *Bradley* requires retrospective application of "current law" by an appellate court only (i) if the terms of the statute or its legislative history do not indicate a contrary intent of Congress, or (ii) if application of current law would not result in manifest injustice. In this case, Congress' intent that the statute only apply to judgments entered after its effective date is clear. Congress delayed the effective date for six months after the enactment of the statute, and statements in the legislative history show that Congress specifically provided a "transition period". Postponement of an effective date is inconsistent with an intent that a statute apply retroactively and shows that Congress had a countervailing concern for the reliance interests of litigants who had made or would make decisions with respect to appeals or the payment of judgments based on the pre-amendment rates.

Such a concern would be justified in a situation such as this case. Application of amended § 1961 to the December 2, 1981 damage verdict, the event selected by the lower courts to trigger the accrual of interest, would be unfair to Kaiser. In fact, the district court specifically found, as a fact, that it was the understanding of the parties and the district court that any postjudgment interest was accruing at the state law rates prescribed in the pre-amendment version of § 1961. Holdings by other federal courts and the position adopted by the Administrative Office of the United States Courts are consistent with and reinforce this understanding. In making postjudgment decisions to appeal or pay the judgment, Kaiser clearly had a right to assume that interest ran at Pennsylvania's six percent simple interest rate. Application of amended § 1961 retroactively to the judgment in this case entered prior to its effective date is manifestly injust to Kaiser. This manifest injustice displaces the presumption of retroactivity under *Bradley*.

II.

This Court recently reaffirmed the traditional bias against retroactive laws in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), where it stated that "congressional

enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 471. The Court in *Bowen* relied on *Greene v. United States*, 376 U.S. 149 (1964), and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), suggesting that the well-founded bias against retroactivity fully applies where the law changes while a case is pending on direct review. *Bowen* appears to conflict with *Bradley*.

Bowen is the better view. The *Bradley* standard, with its case-by-case analysis of possible manifest injustice, requires courts to forever revisit the applicability of a new statute. In addition, because the governing law may depend entirely upon the fortuitous timing of the appeal process, the *Bradley* rule produces arbitrary and unfair results. Moreover, it assumes that Congress *intends* these arbitrary and unfair results. The *Bradley* presumption in favor of applying current law should be clearly and unequivocably replaced with the traditional presumption that statutes do not operate retroactively unless Congress explicitly so provides.

III.

The holding of the Court below that 28 U.S.C. § 1961 requires calculation of postjudgment interest from the date of the *verdict* squarely conflicts with the explicit terms of the statute, which provides unambiquously that interest shall be calculated "from the date of entry of the *judgment*". 28 U.S.C. § 1961. Where a statute is not ambiguous and where no exceptional circumstances are present, courts should not construe a statute contrary to its plain language.

Fed. R. App. P. 37 confers no discretion to depart from the explicit statutory terms of § 1961. Rules of court must conform to Acts of Congress, or they are invalid. Rule 37 may not be construed in a way that renders it inconsistent with § 1961. *See* 28 U.S.C. § 2071. To the extent that Rule 37 confers any discretion, therefore, it only allows a choice among the competing *judgment* dates in this case from which to measure postjudgment interest — July 2, 1986, the date judgment was reinstated

on the district court docket, or December 4, 1981, the date the reinstated judgment was originally entered. In a case such as this, where respondents' success was not clear cut, where respondents' own conduct at trial contributed substantially to the length of the proceedings and the necessity for retrial, and where the treble damage recovery more than adequately ensures that respondents will be fully compensated, the equities clearly favor measuring interest from the date the previously vacated judgment was reinstated.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF *BRADLEY V. RICHMOND SCHOOL BOARD.*

The Court below used the test set forth in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), to evaluate whether amended § 1961, the statute which changed the method for calculating postjudgment interest on judgments entered in federal district court, applies retrospectively to judgments entered prior to its effective date. Assuming *Bradley* provides the proper framework to decide this case,[2] the Court below erred in its application and interpretation of *Bradley*.

In *Bradley*, this Court announced "the principle that a court is to apply the law in effect at the time it renders its decision," unless (1) there is legislative history to the contrary; *or* (2) there is statutory direction to the contrary; *or* unless (3) doing so would result in "manifest injustice." 416 U.S. at 711. To displace the *Bradley* presumption of retroactivity, a party need only demonstrate the applicability of one of these three exceptions. *Id.*

The majority of the panel in the Court below erroneously concluded that not one of the *Bradley* exceptions applied in this case. It therefore held that *Bradley* compelled application of amended § 1961 to the December 2, 1981 damage verdict

2. Kaiser contests the viability and applicability of the *Bradley* standard in light of later decisions of this Court. *See* § II, *infra*.

chosen to begin the accrual of postjudgment interest, even though this date preceded the effective date of the new statute.

The decision of the Court of Appeals should be reversed. Retroactive application of amended § 1961 is contrary to both the intent of Congress and the specific terms of amended § 1961. In addition, the Court's application of the amendment here results in manifest injustice to Kaiser. Accordingly, this case falls within all three exceptions to *Bradley* and the Court of Appeals erred in calculating postjudgment interest in this case based on the rate prescribed in amended § 1961.

A. The Statutory Language And Legislative History Of Amended § 1961 Show That Congress Intended That The Amendment Apply Prospectively Only.

Amended § 1961 is not silent as to whether it should apply retroactively. Congress not only included a specific effective date, it chose to *delay* the effective date for six months until October 1, 1982. The postponed effective date shows that Congress did not intend the statute to apply retroactively, as retroactive application of a statute with a postponed effective date is irrational, produces unfair results and is contrary to any conceivable intent of Congress. It absurdly hypothecates that Congress intended to discriminate between holders of identical judgments entered on the same day, based upon whether an appeal or other postjudgment proceeding extended beyond the delayed effective date. Judge Stapleton, dissenting below, recognized this irrationality, stating that he was "unwilling to attribute to Congress an intent to discriminate between the holders of simultaneously entered judgments based on whether their appeals were still pending on the effective date of the Act." (P.A.27).

The decisions of this Court reflect recognition that a delayed effective date indicates Congress' intent to apply a statute prospectively only. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721-22 n.40 (1978), this Court explicitly equated a delayed effective date with prospectivity:

> In 1974, *Congress underlined the importance of making only gradual and prospective changes in the rules that govern* pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 829. *The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted.*

Id. (emphasis added). *Accord Malone v. White Motor Corp.*, 435 U.S. 497, 517 (1978) (delayed effective date shows Congress' concern over impact of legislation if applied retroactively). On a number of occasions, this Court has inferred nonretroactivity of a statute from the mere fact that the statute had an effective date, regardless of whether it was a *delayed* effective date. *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 641 (1985). *See also Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 630 (1985) (Stevens, J., dissenting).

The lower courts consistently hold that an effective date, especially a postponed effective date, indicates that a statute should be construed to apply only prospectively. *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 747 (D.C. Cir. 1986) (explicit provision for effective date of Cable Act warrants prospective application of Act); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983) ("[i]t would seen anomalous for the legislature to defer the effective date of the Act [Copyright Act of 1978] if it intended the statute, when implemented, to govern retrospectively"); *Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir. 1981) ("[i]t is unlikely that Congress would delay the effective date of Amendments which are to be applied retroactively"). *See generally* Sand, *Sutherland Statutory Construction*, § 33.07 (4th ed. 1986) ("A statute with a definite effective date commences operation from that time").

With respect to the statute at issue in this case, the Courts of Appeals for the Fifth and Ninth Circuits, as well as the dissenting judges in the Sixth Circuit and in the Court below,

noted that the postponement of the effective date indicated that Congress intended that amended § 1961 should only apply to judgments entered after the effective date. *See Campbell v. United States,* 809 F.2d 563, 573-74 (9th Cir. 1987); *Brooks v. United States,* 757 F.2d 734, 742 (5th Cir. 1985); *Bailey v. Chattem, Inc.,* 838 F.2d 149, 156 (6th Cir.), *cert. denied,* 108 S. Ct. 2831 (1988); *Bonjorno,* (P.A.26-27). Kaiser submits that the majority of the Court below erred when it came to the opposite conclusion, finding Congress' deliberate postponement of the effective date too "ambiguous" to warrant displacing the *Bradley* presumption. (P.A.19).

Further support for prospective-only application of amended § 1961 is found in the legislative history. With respect to the effective date, the Senate report states that "[t]he delay is intended to provide time for planning the transition and for permitting the bar to become familiar with the provisions." S. Rep. No. 275, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 42. In addition, the sponsor of a successful amendment to the Senate bill that extended this delay date stated:

> This amendment would provide additional time for the new courts to make necessary policy, procedural, and personnel changes. It will also allow further time for the Federal court system, administrative agencies, patent holders, the practicing bar, and the business community to become more familiar with the new changes in law and procedures, and will allow greater input by affected parties into the administrative changes required by the bill. The additional time will also allow the courts to provide for a smoother transition based on greater professional and public knowledge of the changes in law.

Campbell, 809 F.2d at 574 (quoting 127 Cong. Rec. 29,896 (1981) (statement of Sen. Grassley)). Again, it would be illogical to give the public more time for a "transition" if Congress intended the statute to apply to events, conduct or judgments occurring prior to the enactment of the law or its effective date. *See Aaacon Auto Transport, Inc. v. I.C.C.,* 792 F.2d 1156, 1161

(D.C. Cir. 1986), *cert. denied,* 481 U.S. 1048 (1987) (congressional statement that legislative changes "should be implemented with the least amount of disruption" supported departure from the *Bradley* presumption of application of current law). As Judge Stapleton explained in dissent below:

> Congress chose to postpone for a very substantial period the relief it was affording to plaintiffs whom it perceived as being substantially undercompensated by prevailing state interest rates. This decision suggests to me that Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates.

(P.A.27).

Finally, an exclusively prospective construction of amended § 1961 comports with the wording of the statute which establishes a method for determining the applicable interest rate which is tied to the date of entry of judgment. At least two courts have found an indication that Congress intended only prospective application from the fact that the rate is "tied inextricably to the date the judgment enters." *Litton,* 746 F.2d at 175; *Brooks v. United States,* 757 F.2d 734, 742 (5th Cir. 1985).[3]

The Court below erred in applying the "*Bradley* presumption" in the face of the clear indications from both the language of the statute and its legislative history that Congress intended

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3. Congressional intent to apply amended § 1961 prospectively can likewise be gleaned from the forward-looking statements in the Senate Report that the new rate "*would be*" keyed to market rates and that the "new interest rate on judgments *will apply* uniformly. . ." S. Rep. No. 275, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21-22 (emphasis added). In *Bennett v. New Jersey,* 470 U.S. 632 (1985), this Court found very similar language in the legislative history of a different statute indicated that Congress did not intend the *Bradley* rule to apply. *Id.* at 641 (report stated that new laws clarified "manner in which school districts *are to distribute* Title I funds. . .").

that amended § 1961 should apply only to the calculation of postjudgment interest on judgments entered after its effective date.

B. Amended § 1961 Should Not Apply Here Because This Case Fits Within The "Manifest Injustice" Exception To The *Bradley* Rule.

The *Bradley* presumption also does not apply in this case because its application would be unjust to Kaiser. This exception to *Bradley* stems from the statement in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties. . ." 5 U.S. at 110. The *Schooner Peggy* Court also explained that manifest injustice would be more likely to result from retroactive application of current law in cases not involving "great national concerns."

Based on these remarks in *Schooner Peggy*, the Court in Bradley set forth three elements to determine whether manifest injustice would result from retroactive application of a statute: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change of the law upon those rights. 416 U.S. at 717. The district court in this case properly applied these factors and concluded that retroactive application of amended § 1961 would result in manifest injustice to Kaiser. The Court of Appeals erred in overturning the decision of the district court and its decision should be reversed.

1. This Case Involves Private Parties And Does Not Implicate "Great National Concerns".

The district court made the correct initial observation that the parties to this action are *private parties* and that an action by an individual litigant to obtain an increase in postjudgment interest rates does not implicate "great national concerns." (P.A.45). The conclusion of the district court comports with that of the Second Circuit in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168, 175 (2d Cir. 1984), where that court

stated that "[w]hatever consideration is appropriate for antitrust plaintiffs as private attorneys general bringing suits that serve the national interest, *there is little doubt that national interests are not affected by the outcome of this collateral action to secure an increase in the rate of post-judgment interest.*" (Emphasis added).

By contrast, the Court of Appeals in this case came to the startling opposite conclusion that, because a civil antitrust plaintiff assumes the role of a private attorney general by aiding in the enforcement of the antitrust laws in the merits portion of the case, "an action to increase the rate at which post-judgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interests." (P.A.21). The illogical effect of the holding of the Court of Appeals is to transform every statute construed or applied in an antitrust case — cases which could continue for years and encompass a host of substantive and procedural statutes and regulations — into statutes implicating "great national concerns" and to thereby afford the antitrust plaintiff an advantage when the court construes those statutes. This approach does not comport with *Bradley*, with *Schooner Peggy* or with logic, and should be rejected by this Court.

In *Bradley*, the Court found that the specific attorney's fee statute at issue, § 718 of the Education Amendments of 1972,[4] which applied only to successful school desegregation litigation, had "to do with the 'great national concern' " of vindicating "a national policy of high priority." *Id.* at 720. The Court recited Congress' great concern that because the Civil Rights Act of 1964 did not include damages as a remedy, its private enforcement would be unlikely absent some incentive. *Id.* Section 718 was enacted as that incentive. Here, no similar claim is made with respect to § 1961. Unlike § 718, § 1961 is a statute of general application which applies to all money judgments recovered in federal district court and is not tied to antitrust cases or to any other specific type of litigation. Indeed, it applies with

4. *Previously codified at* 20 U.S.C. § 1617, 86 Stat. 369, *repealed by* Pub. L. No. 97-35, Title V, § 587(a)(1), 95 Stat. 480 (1981).

equal force in diversity cases where no federal statutes are implicated on the merits. Respondents argue that § 1961 is imbued with "great national concern" *only* because it is being construed in the context of an antitrust case.

The statute of "great national concern" in *Schooner Peggy* was a treaty implicating international relations and the avoidance of potential war with France. *Schooner Peggy* cannot reasonably be read to mean that the mere fact that Congress chose to enact a statute on any subject shows that the statute implicates "great national concerns" comparable to war with France. Otherwise, the "manifest injustice" exception would be meaningless in every case construing a federal statute or regulation.

The Court of Appeals wrongly relied upon *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634-35 (1985). In *Mitsubishi*, Soler, one party to an international arbitration agreement, sought to avoid arbitration and bring an antitrust case in the United States court system. Soler argued that the private attorney general aspect of the antitrust laws was so central to American antitrust policy that a party should be entitled to a U.S. judicial forum regardless of having agreed to arbitrate. This Court *rejected* Soler's argument that it should have the ability to circumvent the arbitration agreement based on consideration for its role as a private attorney general. *Id.* at 635-36. The construction of the postjudgment interest statute, like the enforceability of the arbitration agreement in *Mitsubishi*, should not depend on the subject-matter of the claims in the case.

The rate of postjudgment interest affects only the private interests of judgment holders and creditors. The change in the rate effectuated by amended § 1961 may have affected some individual litigants, but does not implement an important national policy or implicate matters of great national concern. The Court below erred in concluding to the contrary.

2. Application Of Amended § 1961 Would Be Unfair And Infringe Upon Kaiser's Rights.

The Court of Appeals also erred in rejecting the district court's analysis of the nature of Kaiser's rights and the impact of applying amended § 1961 on those rights. The district court correctly evaluated the nature of Kaiser's rights and found that "Kaiser had a right to rely on interest accruing at Pennsylvania's simple 6% rate." (P.A. 46). The district court reached this conclusion based in part upon representations which respondents made to the Court of Appeals on March 15, 1985, *"two and one-half years after the effective date of amended § 1961."* (P.A.46). In connection with a motion to expedite a previous appeal in this case, respondents stated:

> *Interest is accruing on this judgment at a rate of only six percent,* compared to substantially greater rates of money market interest. *Section 1961(a) of Title 28 U.S.C., as amended in 1982, is apparently not retroactive to judgments,* such as the 1981 judgment in the present case, entered prior to the effective date of the 1982 amendment. The continuing prejudice to the plaintiffs-appellants of a noncompensatory rate of interest, extending through the summer recess of the Supreme Court, is unfair. (Emphasis added).

(P.A.46). While the district court did not find respondents estopped from contradicting this representation — as it might have — it found that this statement illustrated "the common understanding of both parties and this court." (P.A.46). Therefore, the district court rightly concluded that Kaiser was justified in relying on this understanding.

The evolving body of case law, both in the Third Circuit and elsewhere, supported Kaiser's right to assume that interest ran at Pennsylvania's six percent simple interest rate. Prior to its decision in this case, the Court of Appeals for the Third Circuit had twice before ruled on the question of whether amended § 1961 should be applied to judgments entered prior to its effective date, and twice it decided that it *should not.*

In *United States ex rel. Billow v. E.J.T. Construction Co.*, No. 83-1190, Slip op. (3d Cir. Feb. 7, 1984), the Court of Appeals said:

> The district court ruled that the new market based rates for postjudgment interest *should not apply to judgments entered prior to the effective date of the amendment* (October 1, 1982).
>
> *We find no error in the decision of the district court.*

Id. at 3. (Emphasis added).

Later in 1984, the Court of Appeals, in a published opinion, again addressed the issue. *See Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985). In *Devex*, the district court awarded damages in 1980. This Court affirmed the damage judgment in 1981. In 1983, the district court applied the prior version of § 1961 and awarded postjudgment interest pursuant to state law from 1980, holding that the amendment to § 1961 did *"not impact upon this case because it did not take effect until October 1, 1982, well after judgment was entered."* 569 F. Supp. 1354, 1365-66 n.2 (D. Del. 1983). In 1984, noting that Congress had amended § 1961 as of 1982, the Court of Appeals affirmed the district court and applied the prior version of § 1961, stating that "28 U.S.C. § 1961 provides only that postjudgment interest 'shall be calculated from the date of the entry of the judgment, *at the rate allowed by State law.*' " 749 F.2d at 1023, 1024 n.5.

Four other Courts of Appeals came to the same conclusion. *See Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168, 175 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943 (7th Cir. 1984); *United States v. Dollar Rent A Car Sys.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983); *see also Peterson v. Crown Fin. Corp.*, 553 F. Supp. 114, 116-17 n.4 (E.D. Pa. 1982). *Cf. United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (one factor in whether to apply a judicial decision retroactively is the settled nature of the law prior to the decision); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971).

Kaiser's reliance interest was further reinforced by the position of the Administrative Office of the United States Courts. As early as 1982, the Administrative Office of the United States Courts declared that the new rate of postjudgment interest would apply only to judgments entered on or after October 1, 1982. (P.A.57). Indeed, the Administrative Office did not and does not provide district courts with T-bill rates applicable for time periods prior to October 1, 1982. (P.A.59-65). The opinion of the specific administrative agency charged with administering the postjudgment interest statute illustrates the practice of federal courts nationwide in implementing the transition from the prior version to amended § 1961. It clearly was an appropriate factor for Kaiser to take into consideration in making postjudgment decisions. *Brooks*, 757 F.2d at 742; *Litton*, 746 F.2d at 174.

The district court also correctly determined that application of the intervening change in § 1961 would impose additional and unforeseeable obligations upon Kaiser, another factor that *Bradley* held militates against application of current law. (P.A.46-47). In *Bradley*, this Court concluded that there was no reason to believe that the defendant, had it been aware of the new statutory obligation, would have acted any differently. 416 U.S. at 721. The same cannot be said here. The district court properly recognized that Kaiser might well have acted differently "had it realized its new statutory obligation on October 1, 1982." (P.A. 46). The court explained that although the "appeals of Kaiser to the Court of Appeals and the petition for certiorari to the Supreme Court were not frivolous and not for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending," Kaiser "might have chosen to pay the amount of the judgment earlier had it reason to believe that interest after October 1, 1982 would compound at a rate of more than 6%." (P.A.47). The Court of Appeals for the Second Circuit came to the same conclusion in a case virtually identical to this one. *See Litton Systems, Inc. v. A. T. & T*, 746 F.2d 168, 176 (2d Cir. 1984).

The district court correctly concluded that "[i]t would be manifestly unjust to Kaiser to apply amended § 1961 by calculating interest at the higher T-bill rate as of October 1, 1982 or any time prior thereto when the amendments to § 1961 did not become effective until October 1, 1982." (P.A.47).[5] The contrary decision of the Court of Appeals should be reversed.

II. THE COURT BELOW ERRED IN APPLYING A PRESUMPTION IN FAVOR OF RETROACTIVE CONSTRUCTION OF STATUTES CONTRARY TO THIS COURT'S RECENT HOLDING IN *BOWEN V. GEORGETOWN UNIVERSITY HOSPITAL.*

Retroactive application of amended § 1961 was erroneous under the standard set forth in *Bradley* — a standard which appears to establish a presumption *in favor of* retroactive application of legislation. However, less than one year ago, this Court unanimously declared and reaffirmed the existence of a firm presumption against retroactive construction of statutes, stating that *"congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468, 471 (1988) (emphasis added). Notwithstanding *Bowen*, the Court of Appeals in this case applied the directly contrary *Bradley* rule of statutory construction without either citing or distinguishing this Court's language in *Bowen*.[6]

5. The Court of Appeals did not identify or address Kaiser's rights at all. Instead, it simply stated that *respondent's* "right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments." (P.A.22). Kaiser respectfully suggests that this statement by the Court of Appeals shows that the Court erred in beginning the accrual of postjudgment interest *prior* to "the final controlling judgment on the merits" — *i.e.*, July 2, 1986. If interest is measured from July 2, 1986, Kaiser agrees that the 1982 amendment to § 1961 applies and interest runs at the appropriate T-bill rate for that date.

6. The Court of Appeals did note, however, that "at first glance," the *Bradley* presumption "seems inconsistent" with the "long-standing rule of statutory construction that statutes are presumed to have only 'prospective' effect and will be given 'retroactive' effect only if there is affirmative legislative direction to do so." (P.A.17).

Kaiser submits that, in light of *Bowen*, the Court of Appeals' holding that *Bradley* controlled the outcome should be reversed.

A. The Law Of This Nation Traditionally Has Disfavored Legislation That Has Retroactive Effect.

This Court in *Bowen* articulated and applied the ancient bias against retroactive laws. Retroactive statutes have been disfavored and considered unfair and oppressive since antiquity. *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936) (cited with approval in Justice Scalia's concurrence in *Bowen*, 109 S.Ct. at 479). Roman and Greek law incorporated this distaste for retroactive laws and British common law courts "applied the bias against retroactivity as a guide to the construction of statutes." Smead, *supra*, at 775-76.

The universal aversion to retroactive laws stems from the consensus that notice or warning of a new rule should be given in advance of actions or events whose effects are to be judged. *See* Sand, *Sutherland Statutory Construction*, § 41.02 (4th ed. 1986). "The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known." *Id.* It is perceived as unfair when the legislature changes the legal status or consequences of past events or transactions. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 Ohio N.U.L. Rev. 253, 258 (1983).

American law "borrowed this principle and it soon became recognized as a rule of construction which our courts would follow in interpreting statutes. . . . Retroactive laws were held to be oppressive and unjust, and it was maintained that *the essence of a law was that it be a rule for the future.*" Smead, *supra*, at 780 (and cases cited therein). (Emphasis added). *Accord* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692-93 (1960) (listing reasons for the traditional bias against retroactive legislation).

From their inception, therefore, American courts have refused to give legislative acts retroactive effect unless their express language so provided. *Dash v. Van Kleek*, 7 Johns (N.Y.) 477, 5 Am. Dec. 291 (1811) (Kent, J.) ("A statute ought never to receive such a construction, if it be susceptible of any other. . .").

As early as 1806, this Court declared that:

> Words in a statute ought not to have retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the preexisting situation of the parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms and the manifest intention of the legislature.

United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806). Since *Heth*, this Court has consistently reiterated its distaste for retroactive legislation. *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See Miller v. United States*, 294 U.S. 435, 439 (1935); *Shwab v. Doyle*, 258 U.S. 529, 534 (1922); *United States v. American Sugar Refining Co.*, 202 U.S. 563, 577 (1906); *White v. United States*, 191 U.S. 545, 552 (1903); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798) (opinion of Paterson, J.). *See* Smead, *supra*, at 781 n.22 (listing 29 Supreme Court cases adhering to this principle of statutory construction). *Cf. Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D. N.H. 1814) (No. 13,156) (opinion of Story, J.). This Court recently referred to the presumption that statutes operate only prospectively as the "first rule of construction." *United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982).

The presumption has been applied by this Court regardless of whether the law was passed before a case arose or during the time a case was pending. *See Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276

U.S. 160, 162-63 (1928). *See also* Freeman, *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 Bus. Law. 215, 217-18 (1986). In *Greene v. United States*, 376 U.S. 149 (1964), for instance, the plaintiff sued the government alleging that his security clearance had been unlawfully revoked. After he had instituted a claim, but before a determination of the appropriate remedy, the regulations governing the procedure for obtaining restitution were changed. Despite the fact that the law had changed while the case was pending and the new regulations were "current law" at the time of the decision, this Court adhered to the "first rule of construction" that new laws apply prospectively only, and held the new regulations inapplicable. *Id.* at 160.

Likewise, in *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), this Court adhered to the presumption that statutes should be construed to apply only prospectively even when the statute at issue was enacted while the case was pending. In 1923, the Commissioner of Internal Revenue determined that respondent Magnolia had overpaid taxes for the years 1917 and 1918 and issued certificates for the return of those amounts. The certificates stated that "interest status will be determined as soon as necessary data can be assembled." 276 U.S. at 161. In 1924, Congress enacted a new statute changing the applicable method of calculating interest. The Commissioner paid interest calculated pursuant to the method prescribed in the prior statute. Magnolia sued, contending that, "as the interest had not yet been paid [it] became entitled to an amount calculated according to the later enactment." Id. at 162.

This Court rejected Magnolia's contentions, noting that both statutes provided: "[u]pon the allowance of" a refund, "interest shall be allowed. . ." *Id.* The Court identified October 11, 1923 — a date prior to the enactment of the new statute — as the date of "allowance", regardless of the fact that the interest was not yet paid on that date. It stated that there was "nothing to suggest that [the new statute] was intended to change the rule as to refunds theretofore allowed." *Id.* The Court held that the new statute would not be applied to refunds if the "allowance" date fell before the enactment of the new statute because

"[s]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purposes so to do plainly appears." Id. at 162-63 (emphasis added). The *Magnolia* case is directly analogous to this case. Like the "allowance" date there, the "judgment" date chosen to begin the accrual of interest in this case fell prior to the enactment or effective date of amended § 1961.

Under the reasoning of *Magnolia* and *Greene*, and the many other cases adhering to the traditional bias against retrospective application of statutes, the prior version of § 1961 should be presumed to govern the calculation of postjudgment interest on judgments entered prior to its amendment and interest should be calculated in this case at the Pennsylvania rate of six percent. The Court of Appeals' reliance on a contrary presumption to come to the opposite result should be reversed.[7]

7. Application of the traditional presumption that a statute applies only prospectively does not turn on whether retroactive application would disturb "vested" rights. Even putting aside the esoteric question of distinguishing between "vested" and "unvested" rights, *see* Smith, *Retroactive Law and Vested Rights*, 5 Tex. L. Rev. 231 (1927), this argument misses the mark.

When a statute does not on its face apply retroactively, the court first must determine whether Congress intended it to apply retroactively. In the absence of clear legislative direction, a court applies the principles and presumptions of statutory construction, including the presumption that Congress does *not* intend retroactivity, as a guide to legislative intent. *See* Sand, *Sutherland Statutory Construction*, § 45.13 (4th ed. 1986). If congressional intent to apply the law retroactively is clear, the court evaluates the effect retroactive application will have on the parties and their rights, including whether the rights are vested. It must then determine if the intended retroactive effect is constitutional or whether it runs afoul of the Due Process Clause or one of the specific constitutional provisions designed to eliminate unfairness of this kind. *See* U.S. Const. article 1, section 9, clause 3; *id. section 10, clause 1* (ex post facto laws, bills of attainder, impairment of contracts); *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 730 (1984) ("retroactive legislation does have to meet a burden not faced by legislation that has only future effects" and it is more difficult for it to pass constitutional muster).

Commentators uniformly agree on this dual approach to the question of retroactivity. *See, e.g.*, DeMars, *Retrospectivity And Retroactivity of Civil Legislation Reconsidered*, 10 Ohio N.U.L. Rev. 253, 259 (1983); Smead, *The Rule Against Retroactive Legislation*, 20 Minn. L. Rev. at 776, 789, 791; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960); Sand, *Sutherland Statutory Construction*, § 41.02 (4th ed. 1986).

B. The *Thorpe* And *Bradley* Decisions.

Intervening in the midst of the consistent judicial bias against retroactive statutes, are this Court's decisions in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Thorpe v. Housing Authority*, 393 U.S. 268 (1969). Relying primarily on *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), and without reference to the traditional presumption against retroactivity, the *Thorpe* and *Bradley* decisions announced a presumption that current law applies to any case before it, regardless of the law in effect at the time the pertinent events or conduct occurred.

In *Thorpe*, a tenant in a federally-assisted housing project contended that she was being evicted because she had exercised her First Amendment rights and that the eviction was therefore unconstitutional. At the time the landlord initiated the eviction, as well as while the case was in the district court and the Court of Appeals, the law did not require the landlord to state any reasons for eviction. No reasons had been given in this instance. Under these prior standards, the tenant's arguments had been rejected. However, while the case was pending before this Court, the Department of Housing and Urban Development ("HUD") issued a directive requiring notice of the reasons for eviction and an opportunity by the tenant to respond prior to eviction from a federally-assisted housing project. *Id.* at 270-73. This Court remanded the case for reconsideration in light of the new HUD directive, but the lower courts on remand construed the directive not to apply when "[a]ll critical events" relevant to the eviction process occurred prior to its issuance.

This Court reversed, holding that the HUD directive applied. The Court relied on the so-called "general rule", derived from *Schooner Peggy*, that "an appellate court must apply the law in effect at the time it renders its decision." 393 U.S. at 281. Without referring to the critical fact that the legislation in *Schooner Peggy* applied retroactively by its own

terms, the Court stated that this "same reasoning has been applied where the change was constitutional, statutory[8], or judicial." *Id.* at 282.

The Court's only reference in *Thorpe* to any of the host of decisions applying the presumption *against* retroactive application of legislation came in a footnote where, without explanation, the Court characterized one of those cases, *Greene v. United States*, 376 U.S. 149 (1964), as an "exception" to the *Schooner Peggy* presumption for cases in which its operation would work "manifest injustice." 393 U.S. at 282 n.43.[9]

In *Bradley*, the Court likewise relied on *Schooner Peggy* to justify a presumption in favor of retroactive application of legislation. *Bradley* involved the propriety of an attorney's fee award in litigation over the desegregation of the Richmond, Virginia, public school system. While the issue of the availability of attorney's fees was before the Court of Appeals, Congress enacted § 718 of the Education Amendments of 1972, *previously codified at* 20 U.S.C. § 1617, which gave federal courts the authority to award a prevailing party a reasonable attorney's fee when appropriate upon entry of a final order in a school desegregation case. This Court held that § 718 could be applied retroactively to services rendered prior to its enactment, "where the propriety of a fee award was pending resolution on appeal when the statute became law." *Id.* at 710.

8. It should be noted that the case cited by the Court for the proposition that this principle extends to statutory changes dealt with a statute, like the statute in *Schooner Peggy*, that specifically provided that it applied to pending cases. *Carpenter v. Wabash R.R. Co.*, 309 U.S. 23, 26 (1940).

9. The Court's characterization of *Greene* was clearly not compelled by, nor even consistent with, the language of that decision. On the contrary, the Court in *Greene* declared its adherence to a *general rule*, not an exception, stating that it applied the "first rule of statutory construction" that "legislation must be considered as addressed to the future, not to the past . . .' " 376 U.S. at 160 (quoting *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

While the Court in *Bradley* appeared to reject the presumption that statutes apply only prospectively in the absence of legislative direction to the contrary, it is significant that in *Bradley*, as in *Schooner Peggy*, there was evidence that Congress intended the statute to apply retroactively. Indeed, the *Bradley* court identified in the legislative history of § 718 "at least implicit support for the application of the statute to pending cases." 416 U.S. at 716. Congress had specifically *deleted* a provision in the statute which provided that it would apply only to services rendered after the enactment date. *Id.* at 716 n.23. The Court observed that "while there is no explicit statement that § 718 may be applied to services rendered prior to enactment, we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated." *Id.*

As in *Thorpe*, the Court inexplicably referred to the result in *Greene v. United States*, 376 U.S. 149 (1964), as an "exception" to the general rule, where retrospective application would bring about "manifest injustice." 416 U.S. at 717 n.24.

C. This Court's Recent Reaffirmation Of The Traditional Rule Of Construction Against Retroactive Application Of Statutes Requires Reversal Of The Decision Of The Court of Appeals.

Perhaps due to the difficulties inherent in the *Bradley* standard and its apparent conflict with the traditional bias against retroactivity, this Court's decisions involving the retroactivity of legislation since *Bradley* have exhibited some inconsistency.

This Court has only once invoked the "*Bradley* presumption" to construe a rule of law retrospectively. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (Powell, J.).[10] Significantly, that case did not involve the construction of

10. In *Cort v. Ash*, 422 U.S. 66, 76-77 (1975), the Court mentioned *Bradley* and *Schooner Peggy*, but the case did not involve retroactivity. The Court simply held that the 1974 Amendments to the Federal Elections Campaign Act would govern applications for injunctive relief with respect to all presidential elections which occurred *after* it was enacted.

a statute. Instead, the rule at issue in that case was established by *judicial decision*, and the Court has consistently distinguished between the appropriate retroactivity analysis in these two contexts. Judicial decisions have generally carried a presumption of retroactivity, while legislation traditionally applies only prospectively. *See, e.g., United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student").[11] *See also* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960) ("there is the strong common-law tradition that although a court's pronouncements may apply to past conduct, a legislature's functions is to declare law for the future").

By contrast, on three occasions, this Court has refused to permit retroactive application of a newly-enacted law to a pending case. In *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985), the Court, in an Opinion authored by Justice O'Conner, found it unnecessary to reconcile *Bradley* with the presumption against retroactive application because the case fell into the exceptions to the *Bradley* rule. Despite the fact that the case involved only public entities, the Court in *Bennett* held that retroactive application would impinge on pre-existing rights of the parties. 470 U.S. at 639.[12] It also found legislative history indicating that the statute should apply prospectively only. *Id.* at 641.

In two other recent decisions, this Court adhered to the traditional presumption that statutes operate prospectively only

NOTES *(Continued)*

In *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982), the Court assumed "*arguendo*" that a new statute applied, but found that, even if it did apply, it would not alter the result. The three dissenting Justices would have explicitly held the new statute applicable retroactively under the *Bradley* standard. *Id.* at 90-91 n.1.

11. The rule that decisions operate retroactively stems from the traditional notion that judges "found" the law rather than made law. *See* Comment, *Prospective Overruling And Retroactive Application In The Federal Courts*, 71 Yale L.J. 907, 907-08 (1962).

12. The Court did not express the test in terms of "vested" or "unvested" rights. *Id.*

without even attempting to reconcile its approach with *Bradley*. *See Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988); *United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982).

In *Security Indust. Bank*, the Court held that a 1978 amendment to the bankruptcy law, which allowed a debtor to avoid non-purchase money liens on household appliances and furnishings, did not apply to creditors who obtained their liens prior to the enactment date of the new law. In an Opinion authored by Chief Justice Rehnquist, the Court rejected the argument that current law should apply, explaining that the " 'first rule of construction is that legislation must be considered as addressed to the future, not to the past.' " 459 U.S. at 79 (quoting *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)). The Court further noted that " '[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.' " 459 U.S. at 79-80 (emphasis added) (citing *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908)). Chief Justice Rehnquist cited *Schooner Peggy* as *support* for the prospective-only presumption. *Id.*

In *Bowen*, 109 S. Ct. at 471, pursuant to rulemaking authority, the Secretary of Health and Human Services in 1984 promulgated cost limits on reimbursements for expenses to health care providers by the government. The cost-limit schedule "included technical changes in the methods for calculating" cost limits for prior reimbursement periods. *Id.* at 470. As in this case, the effect of application of the new calculation method was financially harsh, ostensibly permitting the Secretary to recoup over $2 million in reimbursement payments from the plaintiff group of seven hospitals.

The Supreme Court held that the Secretary could not apply the new calculation method to reimbursement periods prior to its effective date, stating without exception and without qualification that "*congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.*" *Id.* at 471 (emphasis added). The

Court emphasized that "[r]etroactivity is not favored in the law." *Id.*[13] Although the holding appears directly to conflict with the statement in *Thorpe* that the presumption in favor of application of current law "applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization," 393 U.S. at 282, neither the majority nor the concurring opinion even *mentioned Thorpe* or *Bradley* as a limitation on the prospective-only statutory presumption if the law changes while the case is on appeal.

Bowen is most significant for its reliance on and reaffirmation of *Greene v. United States*, 376 U.S. 149 (1964), and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), both of which involved changes in law where the case was pending on direct review and both of which applied a presumption *against* retroactive application of legislation. *Greene*, which the *Thorpe* and *Bradley* decisions had relegated to the status of an "exception," appears in *Bowen* as primary support for the *general presumption against retroactivity*. Moreover, the *Magnolia* case, which deals with a change in the method for calculating interest on a tax refund, is on all fours with this case. Kaiser submits that this Court's reaffirmation of *Greene* and *Magnolia* in *Bowen* represents adherence to the traditional and better-reasoned presumption against retroactive legislation. It also requires reversal of the decision of the Court below based on a contrary rule of statutory construction.

D. The *Bradley* Standard Should Be Reexamined As It Is Unworkable And Produces Arbitrary And Unfair Results.

This case presents this Court with the opportunity to resolve the seeming inconsistency among its decisions as to

13. Justice Scalia, in his concurring opinion, likewise explained that "[r]etroactive legislation has always been looked upon with disfavor . . . and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation." Id. at 479 (citing Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936)).

whether a presumption exists in favor of, or against retroactive construction of statutes. Kaiser urges the Court to adhere to the traditional presumption articulated in *Bowen* against retroactivity and to reevaluate *Bradley*.

The *Bradley* presumption is unworkable and unfair. Its application arbitrarily depends upon the fortuitous circumstance that an appeal lasts beyond the effective date of a new law. It also depends on individual case circumstances showing the presence or absence of "manifest injustice". It thereby produces widely divergent and unfair results, and infuses the law with an element of uncertainty in an area which would be better served by a bright-line rule. *See Osterneck v. Ernst & Whinney*, 109 S. Ct. 987, 992 n.3 (1989); *Budinich v. Becton Dickinson and Co.*, 108 S. Ct. 1717, 1722 (1988).

The following example in the context of § 1961 illustrates the arbitrary and unfair effect of the *Bradley* standard. Under *Bradley*, an appellate court presumes that amended § 1961 applies to cases before it, even when judgment was entered prior to October 1, 1982. Accordingly, even assuming identical dates of judgment and payment, the duration of the postjudgment proceedings and appeals may determine the amount of postjudgment interest owed. For instance, two identical judgments may be entered in federal district court in Pennsylvania on a particular date – say June 1, 1980. If the appeal in one case concludes prior to October 1, 1982, and interest is then calculated, the defendant would pay only six percent simple interest, regardless of whether he actually *paid* the judgment and the interest after October 1, 1982. By contrast, if the appeal in the other case extends beyond October 1, 1982, the defendant in that case would owe an entirely different amount of postjudgment interest based on T-bill rates, even though the identical judgments were entered and paid on the same dates. Surely the presumptions of statutory construction, which are designed to implement the intent of Congress, should not postulate such an irrational intent of Congress and such an unfair result. This Court itself recognized the arbitrary and unfair nature of this approach in *Bennett v. New Jersey*, 470 U.S. 632, 640 (1985), stating that applying "every statutory change that occurs while

review is pending would be unworkable and would unfairly make obligations depend on the fortuitous timing of completion of the review process."

The "manifest injustice" exception to the *Bradley* presumption is not only unworkable and unfair, it is also impractical and administratively burdensome. The standard contemplates a *subjective, case-by-case* determination of how a statute will be construed, taking into consideration the following factors: "(a) the nature and identity of the parties; (b) the nature of their rights; and (c) the nature of the impact of the change in law upon those rights." *Bradley*, 416 U.S. at 717. Under this standard, a statute may apply retroactively in one case and may not in another, depending on the specific case facts. Simply the identity of the parties and whether they are "private" may determine the outcome, since the Court in *Schooner Peggy* emphasized that in controversies between private parties "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . ." 5 U.S. at 110. Likewise, the applicability of the manifest injustice exception to *Bradley* may hinge on whether the case is one of "great national concern", whether the rights involved are sufficiently "mature and unconditional", and the nature and extent of any reliance. 416 U.S. 719-21.

The *Bradley* "manifest injustice" standard requires courts to forever revisit the question of the applicability of a newly-enacted statute. It requires people to guess at the applicability of a new law and it turns on close questions of the "nature" of parties, their rights and the relative importance of the issues. *See Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting and endorsing an "objective" rather than subjective "case-by-case application" of a statute).

The decisions of the Courts of Appeals applying *Bradley*'s "manifest injustice" test in the context of § 1961 illustrate precisely how it can and does produce unfair results. In *Litton Systems, Inc. v. A. T. & T.*, 746 F.2d 168 (2d Cir. 1984), the Court applied *Bradley's* "manifest injustice" standard to facts virtually identical to the facts of this case. As here, the parties were private parties. As here, the underlying case was an

antitrust case. And as here, the question of the appropriate amount of postjudgment interest was addressed by the Court of Appeals after the effective date of amended § 1961.[14] The Second Circuit, however, came to a conclusion directly contrary to the decision of the Court below, holding that manifest injustice *would* result from application of amended § 1961 to judgments entered prior to its effective date. Applying *Bradley* has led to disparate results for other statutes as well. *Compare United States v. Zannino*, 761 F.2d 52, 55-57 (1st Cir. 1985) (holding that retroactive application of newly-enacted Bail Reform Act to revoke bail of defendant is not manifestly unjust) *with United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985) (finding manifest injustice and denying retroactive effect of Bail Reform Act under same facts).

Statutory construction should not be accomplished on the individual, case-by-case basis that *Bradley* requires. Accordingly, Kaiser urges this Court to reconsider *Bradley*.[15] In the absence of clear evidence of congressional intent to the contrary, a statute that is silent on the question of retroactivity should be presumed to apply only prospectively. *See Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468 (1988).

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14. In *Litton*, prior to the enactment of amended § 1961, a stipulation entered into by the parties inv ving a stay pending appeal reflected the parties understanding that postjudgment interest was accruing at the state law rate of nine percent. *Id.* at 170. Likewise here, as the district court explained, it was "the common understanding of both parties and this court" that interest was running at six percent. (P.A. 46).

15. The Court in *Bradley* recognized that the *Schooner Peggy* doctrine had never explicitly been extended to cases where legislation was not expressly retroactive. 416 U.S. at 712. Moreover, because the legislative history of the statute at issue in *Bradley* contained evidence that Congress intended the statute to apply retroactively, the Court in *Bradley* need not have reached the issue of the scope of *Schooner Peggy*. Kaiser urges this Court to reconsider the dicta in Bradley which appear to extend *Schooner Peggy*.

III. THE COURT BELOW ERRED IN HOLDING THAT INTEREST BEGAN TO ACCRUE ON THE DATE OF THE DAMAGE VERDICT.

Section 1961 provides that interest "shall be calculated *from the date of the entry of the judgment*. . . ." 28 U.S.C. § 1961.[16] Due to the procedural complexity of this case, the lower courts struggled with the identification of "the date of entry of the judgment." However, despite the existence of *two judgment* dates in this case, both lower courts chose instead to begin the accrual of postjudgment interest on the date of a jury damage *verdict*. Kaiser urges this Court to reverse the decision of the Court of Appeals, as the result reached contravenes the plain terms of § 1961.

The procedural chronology of this case is not disputed as it pertains to this question. After retrial of the damage portion of the case, a jury returned a damage verdict on December 2, 1981. *Two days later,* the district court entered judgment in the trebled amount of $9,567,939. On January 18, 1983, the district court partially granted Kaiser's motion for judgment n.o.v., vacated the December 4, 1981 judgment, and entered judgment in the amount of $4,651,560. The Court of Appeals reversed on December 27, 1984, ordering that the December 4, 1981 judgment be reinstated. This Court denied Kaiser's Petition For A Writ Of Certiorari on June 23, 1986 and the case was remanded to the Court of Appeals, which on July 1, 1986 remanded to the district court. On July 2, 1986, the order of the Court of Appeals reinstating the December 4, 1981 judgment was entered on the district court docket.

16. When Congress amended § 1961 in 1982, it did not alter the language of the statute which identifies the date of "entry of judgment" as the starting date for the accrual of postjudgment interest.

A. The Plain Language Of The Statute Provides That Interest Shall Run From The Date Of "Entry Of The Judgment".

Relying on its prior decision in *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987), the Court of Appeals below held that postjudgment interest runs from the date of "ascertainment of damages", regardless of whether that date is the *judgment* date or the *verdict* date. In *Poleto,* three months intervened between the jury damage verdict and the entry of judgment and the Court of Appeals reasoned that it would be inequitable to deny the successful plaintiff interest during this period of delay. In this case, however, the Court of Appeals extended the *Poleto* reasoning beyond cases where it finds an inordinate delay between the verdict and the judgment, to a case where judgment was entered promptly, a mere two days after verdict. The approach adopted by the Court below thus appears to *mandate* the running of interest from the date of a damage verdict in all cases, even when there is no unusual delay between the date of the verdict and the date of entry of judgment. No other court of appeals has so held, although at least two other courts of appeals have allowed, under a so-called "equitable construction" of § 1961, postjudgment interest measured from the date of a jury damage verdict when entry of judgment is delayed to some later date. *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472-73 (2d Cir. 1988); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983).[17]

17. The Fifth and Seventh Circuits have also "equitably construed" § 1961, but only to allow interest to be calculated from a *later* date — the date of entry of judgment upon remand to the district court after the exhaustion of all appeals. *See Affiliated Capital Corp. v. City of Houston,* 793 F.2d 706 (5th Cir. 1986); *Brown & Williamson Tobacco Corp. v. Jacobson,* Nos. 86-2474, 86-2475, Slip. op. (7th Cir. Nov. 6, 1987). In one instance in which it was specifically asked to do so, the Fifth Circuit explicitly refused to allow postjudgment interest to be calculated from the date of the verdict. *See Barrios v. Louisiana Constr. Materials Co.*, 465 F.2d 1157, 1168 (5th Cir. 1972). The Court of Appeals for the District of Columbia Circuit rejects the "equitable construction" approach altogether and adheres to the language of § 1961. That court requires "entry of judgment" to begin the accrual of

This Court should correct the erroneous holding of the Court below and the other courts which, under the guise of "equitable construction", have rewritten the plain language of § 1961. Congress could not have been more specific in drafting § 1961. The statute provides that "interest shall be calculated *from the date of the entry of the judgment* . . ." (emphasis added). The distinction between *a verdict* and *a judgment* is clear and is set forth in Fed. R. Civ. P. 58. *See also United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958) (defining "entry of judgment"). Had Congress intended postjudgment interest to run from the date of verdict, it could simply have drafted or amended the statute to so provide. It did not do so.

This Court has consistently held that, in the "absence of a 'clearly express legislative intention to the contrary', the language of the statute itself 'must ordinarily be regarded as conclusive.' " *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597 (1986)). "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also United States v. Monsanto*, 57 U.S.L.W. 4826, 4827 (June 22, 1989) ("In determining the scope of a statute, we look first to its language") (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

The language of § 1961 is not ambiguous and there is no indication that Congress intended the term "entry of judgment" to be construed other than in conformity to its plain meaning as defined in Fed. R. Civ. P. 58. Moreover, there are no "exceptional circumstances" in this case. The jury returned answers to

NOTES *(Continued)*

postjudgment interest. *Hooks v. Washington Sheraton Corp.*, 642 F.2d 614, 616-18 (D.C. Cir. 1980). In *Hooks*, the court specifically rejected the plaintiff's argument that interest should be calculated as of the date of the jury damage verdict. *Id. See also Millers' Nat. Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93, 104 (10th Cir. 1958) (refusing to measure postjudgment interest from date of verdict).

interrogatories on December 2, 1981, requiring the district court to "promptly approve the form of the judgment" and the clerk thereafter to enter it. "Entry of judgment" occurred promptly on December 4, 1981, and the explicit terms of § 1961 preclude measuring postjudgment interest from any date prior to December 4, 1981.

The date chosen by the Court below to begin the accrual of interest was not "the date of entry of the judgment" and the Court's holding should be reversed.

B. Rule 37 Does Not Expand The Authority To Award Postjudgment Interest In A Way Inconsistent With The Terms Of § 1961.

Fed. R. App. P. 37 provides that "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to the allowance of interest." Respondents have suggested that this rule allows the Court of Appeals discretion to depart from the express terms of § 1961 and measure postjudgment interest from the date of the verdict or any other date which it finds "equitable".[18] This argument has no merit.

This Court has consistently explained that, pursuant to 28 U.S.C. § 2071, the rules promulgated by all federal courts "must also be consistent with Acts of Congress." *Frazier v. Heebe*, 482 U.S. 641, 646 n.4 (1987). *See Colgrove v. Battin*, 413 U.S. 149, 161 n.18 (1973) (if a rule "would conflict with an Act of Congress" it "would therefore be invalid").

To be a valid rule, therefore, Rule 37 must be read in harmony with 28 U.S.C. § 1961 and must encompass its requirement that interest run from "the date of entry of the judgment." If the second sentence of Rule 37 provides any

18. In their Cross-Petition, respondents further argue that Rule 37 allows the Court of Appeals discretion to award postjudgment interest at a rate higher than that specified in § 1961. This argument fails for the same reason, and Kaiser will address it at length in their Responsive Brief.

discretion with respect to the date from which to measure post-judgment interest, that discretion only comes into play when more than one valid money *judgment* has been entered in a case. Then, the Court of Appeals, pursuant to Rule 37, may exercise its discretion to choose the appropriate *judgment* from which to measure interest.

C. The Equities In This Case Favor Interest Calculated From The Date The Judgment Was Reinstated.

The only possible judgment dates from which to begin the accrual of postjudgment interest in this case under § 1961 are December 4, 1981 (the date the reinstated judgment was originally entered) or July 2, 1986 (the date the judgment was reinstated on the district court docket). Kaiser submits that the Court of Appeals erred when it refused to measure interest from July 2, 1986. The equities in this case favor a calculation of postjudgment interest starting on July 2, 1986, the date the judgment was reinstated after remand from this Court and from the Court of Appeals.

On similar facts, this result was reached in *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 711-12 (5th Cir. 1986) (*in banc*). In that case, as here, the "summary of this long, drawn-out antitrust action amply demonstrates that [respondents'] victory was far from clear-cut . . ." *Id.* at 711. In concluding that the equities of the case justified interest measured from the date of remand after the exhaustion of all appeals, the Court reasoned that:

> We would emphasize that our construction of the equities in this case does not force [respondent] to go uncompensated for the loss of value on its money judgment. [Respondent] is entitled, as are all successful antitrust plaintiffs, to recover treble damages from [petitioner]. "Although the treble damage provision may be partially justifiable on compensatory grounds, its principal purpose is to deter antitrust violations. The prospect of a damage award multiplied threefold should provide an incentive for private parties to instigate costly litigation, thus supplementing

> Governmental enforcement." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S. Ct. 1128, 43 L.Ed.2d 400 (1975) (footnotes omitted). In short, [respondent] will collect 6.3 million dollars in damages plus interest from the date final judgment was entered. Because the 4.2 million dollars in treble damages exceeds [respondent's] actual losses, we are not in this case presented with the usual, uncompensated "wronged plaintiff" for which the equitable construction and application of § 1961 and Rule 37 was intended.

Id. at 712.

The *Affiliated Capital* reasoning is equally applicable here. Respondents' victory was far from "clear cut." It took three trials to secure the favorable result in this case. Of five claims contained in the Complaint, respondents failed to prevail on all but one. Respondents also failed to prove a conspiracy claim against two other named defendants, Robert A. Kennedy and Kennedy Culvert Supply Company. After the Court of Appeals reversed the initial directed verdict in Kaiser's favor, respondents failed adequately to prove the existence of damages, necessitating the vacation of the judgment and the retrial of the damage portion of the case. Moreover, when this Court requested the views of the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division on the issues raised in Kaiser's Petition For A Writ Of Certiorari on the merits of the antitrust claims, they characterized the decision of the Court of Appeals as erroneous. *See* Brief For The United States As Amicus Curiae, No. 84-1907 (May 1986). Indeed, they stated that the decision had such "obvious shortcomings" that it was doubtful that any other court would follow the reasoning which led to respondents' victory. *Id.* at 17. Finally, respondents' $9.6 million treble damage recovery exceeded by $6.4 million the damages found by the jury. Like the plaintiffs in

Affiliated Capital, respondents here are not the "usual, uncompensated 'wronged plaintiff' for whom the equitable construction and application of § 1961 and Rule 37 was designed."[19]

If § 1961 has a deterrent purpose to discourage frivolous appeals, it is inapplicable here and should not prevent this Court from measuring interest from July 2, 1986.[20] The district court specifically found that Kaiser's appeals and Petitions to this Court were "not frivolous and not for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending." (P.A.47). *See also Brown & Williamson Tobacco Corp. v. Jacobson,* Nos. 86-2474, 862475, Slip. op. (7th Cir. November 6, 1987) (choosing under equitable principles to measure interest from the date of remand from the Court of Appeals).

To the extent that Fed. R. App. P. 37 affords discretion in choosing on which of several judgment dates to begin the accrual of postjudgment interest in this case, the equities favor July 2, 1986, the date of entry of the judgment upon remand from the Court of Appeals.

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19. Indeed, respondents' $9.6 million recovery is shockingly generous in light of the fact that Columbia's financial statement for its *best year,* prior to the illegal conduct it alleges Kaiser engaged in, showed a net profit of only $21,322. (Appendix to Kaiser's Brief in Appeal No. 83-1079, at 4898).

20. The appeal following the December 4, 1981 judgment was actually initiated by respondents. Kaiser cross-appealed the liability issues.

CONCLUSION

For all of the foregoing reasons, Kaiser respectfully requests that the Judgment of the Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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August 3, 1989

In The

Supreme Court of the United States

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.,) AND BARBARA K. CLISBY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENTS ON KAISER'S PETITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. In awarding interest on an antitrust treble damage judgment, first recovered in 1979, but where the final amount of the recoverable judgment was not reinstated by the Court of Appeals until 1984 (and the Court's mandate did not issue until 1986), was not the Court below correct in refusing Defendants' contention that interest be calculated under a repealed federal interest statute on routine District Court judgments that had looked to state law (Pennsylvania – 6% simple interest), and which was repealed in 1982?

2. For the reasons fully set forth in Respondents' Cross-Petition and Opening Brief (No. 88-1771), did not the Court of Appeals err in failing to award commercial full market rate interest calculated from 1979 pursuant to its equitable, inherent and Fed. R. App. P. 37 power; – where Plaintiffs (as the wronged party) have been denied for over ten years receiving the full measure of their awards, due to delays in the judicial process not of their making; – and where Defendants (as the wrongdoer) have profited from the use of Plaintiffs' money at commercial market rates in excess of $18.6 million?

LIST OF PARTIES AND RULE 28.1 STATEMENT

1. *Plaintiffs*

Respondents and Cross-Petitioners in No. 88-1771: Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.) and Barbara K. Clisby ("Plaintiffs") are the former shareholders and trustees in liquidation of the original Plaintiff below, Columbia Metal Culvert Company of Vineland, New Jersey, which ceased operations in 1977 due to the predatory activity of the Petitioners that was the subject of this lawsuit. Pursuant to Supreme Court Rule 28.1, Plaintiffs state that they have no other corporate affiliations.

Following the death of George M. Kerr, Jr., Respondents petitioned the Court of Appeals to substitute Lorraine Kerr, Executrix of the Will of George M. Kerr, Jr., as a party. That petition was granted by the Court of Appeals on March 29, 1989.

2. *Kaiser*

Petitioners are Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") who were Defendants in the antitrust action below. Kaiser's national and international affiliates are listed in Kaiser's Brief at ii – iii.

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BONJORNO TIME LINE

1972 Kaiser's threat to drive Columbia out of business

1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy

1/7/74 Complaint filed

1974 Price Squeeze

1975 Kaiser's conduct causes Columbia to stop producing pipe

5/2/77 First Trial, Directed Verdict

5/31/77 Cutoff date for damages

5/24/78 Court of Appeals reverses directed verdict and remands for trial

1978 Columbia's plant sold to third party

8/16/79 Trial and Liability Verdict

8/21/79 First Damage Verdict

8/22/79 *Money Judgment Entered $5.4mm

6/17/81 District Court grants new trial on damages

12/2/81 Second Jury Verdict on Damages

12/4/81 *Judgment Entered $9.6mm

1981 Kaiser purchases Columbia's plant

10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended

1/18/83 *District court grants partial NOV, judgment $4.7mm

12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment

6/6/85 Kaiser petition for certiorari

6/23/86 U.S. Supreme Court denies cert. petition

7/1/86 Court of Appeals issues mandate

7/3/86 Kaiser pays $9,567,939 to Plaintiffs

4/11/88 District Court Awards interest $2,632,886

1/9/89 Court of Appeals Judgment Awarding Interest at T-bill rate

1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case

COUNTERSTATEMENT OF OPINIONS BELOW

For a complete statement of the opinions below, as well as the earlier reported decisions in this protracted litigation, Plaintiffs respectfully refer the Court to page 1 of the Brief for Cross-Petitioners on the Merits of Plaintiffs' Cross-Petition in No. 88-1771 ("Plaintiffs' Opening Brief").[1]

COUNTERSTATEMENT OF JURISDICTION

Plaintiffs incorporate the Statement of Jurisdiction from page 2 of Plaintiffs' Opening Brief. With respect to Kaiser's Statement of Jurisdiction, Plaintiffs note that Plaintiffs, as well as Kaiser, filed a Petition for Rehearing before the Court of Appeals. Judges Becker and Hutchinson dissented from the denial of rehearing, but did not indicate whether they were disposed in favor of either Plaintiffs' Petition for Rehearing or Kaiser's. *See* Kaiser Pet. A-29-30.

COUNTERSTATEMENT OF COURT RULES & STATUTES

Ignoring the broad power of the Court of Appeals to award appropriate interest on its judgments, Kaiser omits Fed. R. App. P. 37 from its statement. In addition, Kaiser omits from its quotation of 28 U.S.C. §1961, as amended, the provisions at issue in §1961(b) (requiring annual compounding) and §1961(c)(4) (limiting the scope of the courts whose judgments are covered). Fed. R. App. P. 37 and 28 U.S.C. §1961, as amended, are set forth in the statutory appendix to this Brief. Also included is Fed. R. Civ. P. 67.

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[1] Reproduced for the convenience of the Court on the opposite page is Plaintiffs' "Bonjorno Time Line" from the Appendix to the Cross-Petition.

COUNTERSTATEMENT OF THE CASE

Plaintiffs incorporate the Statement of the Case from pages 2-11 of Plaintiffs' Opening Brief (No. 88-1771). Plaintiffs respectfully refer the Court to the Bonjorno Time Line opposite page 1 for a summary of the principal events in this litigation from 1972. Below is a recap of the most significant admissions as well as omissions and mischaracterizations from Kaiser's Brief.

A. THE FACTS NOT IN DISPUTE: Kaiser Does Not Dispute Any Of The Crucial Facts Mandating An Adequate Award Of Interest To Preserve The Value Of The Judgment

Kaiser does not and cannot dispute:

1. *KAISER'S 1979 LIABILITY*: Kaiser's liability for intentional, predatory destruction of Plaintiffs' business over the period from 1971 to 1977 was established in August 1979, and that finding of liability has never been disturbed. (J.A. 87-90, 101-02, 154, 190-98).[2]

2. *DAMAGES MEASURED AS OF 1973 TO 1977*: Plaintiffs' damages were valued as of no later than May 31, 1977, with some damages valued as early as 1973, and no prejudgment interest. *See* J.A. 90, 129, 170.[3] (Kaiser argued to the jury damages should be valued as of 1975 (J.A. 131-34)).

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[2] Plaintiffs did not file post-trial motions after the 1979 verdicts and judgment, although the jury awarded much lower damages than Plaintiffs had sought. Kaiser alone filed post-trial motions, and obtained a retrial limited to recalculation of damages in which the 1979 jury's damage award was *emphatically reaffirmed* by the second unanimous jury. *Compare* J.A. 90-91 ($5,445,000) *with* J.A. 145-46 ($9,567,939).

[3] Despite the lack of any interest over the period from 1973 to the original judgment in 1979, Plaintiffs have only sought interest from the date of their original judgment over the long periods of delay caused by

(Continued on following page)

3. *DELAY IN PAYMENT OF ORIGINAL LIABILITY*: Kaiser paid Plaintiffs no money until July 3, 1986, (Kaiser Brief at 5), although Kaiser's liability was established in 1979 and Plaintiffs' damages were valued as of 1973 to 1977.

4. *CONTINUED DELAY IN PAYMENT OF INTEREST LIABILITY*: Kaiser, to this day, has never tendered to Plaintiffs or into court, under Fed. R. Civ. P. 67, one penny of interest to stop or reduce the continued running of interest. See pp. 4-5 below.

5. *KAISER'S GAIN, AND PLAINTIFFS' LOSS, FROM DELAY*: Kaiser's gain and Plaintiffs' corresponding loss at commercial market rates from delay in payment of the judgment amount ($9,567,939) from August 1979 to the date of briefing before the court below, was over $17 million (J.A. 303) (increased to $18.6 million as of August 3, 1989). Only $8 or $12 million would be awarded under the Court of Appeals' decision. Plaintiffs' Opening Brief at 44 n.72; Kaiser Brief at 10.

6. *OLD §1961 REPEALED TO PROHIBIT INADEQUATE STATE LAW INTEREST*: Current law for interest awards now in effect, and in effect as of the Court of Appeals judgment on the merits (December 27, 1984) and issuance of the mandate (July 1, 1986), is Fed. R. App. P. 37 and amended 28 U.S.C. §1961. The latter was enacted by Congress in 1982 expressly to preserve federal court judgments and prevent inadequate interest under state law, as provided under the version repealed in 1982. S. Rep. No. 275, 97th Cong., 2d Sess. at 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21.

(Continued from previous page)

Kaiser's post-trial motions and Kaiser's refusal to accept the verdicts of the juries and judgments of the courts.

Kaiser's notation that the 1983 appeal was "initiated" by Plaintiffs and that Kaiser "cross-appealed the liability issues" (Kaiser Brief at 44 n.20) disregards Kaiser's post-trial motions challenging the 1981 damage recalculation it had sought which were the source of the delay.

B. KAISER'S GAIN AND PLAINTIFFS' LOSS FROM DELAY: Kaiser Obtained Stays Of Execution And Never Tendered Any Money Between The Establishment Of Liability In 1979 And The Issuance Of The Court Of Appeals' Mandate In 1986 – To This Date Kaiser Has Not Tendered One Penny Of Interest

Although Kaiser, at any time from the date of the receipt of Plaintiffs' Complaint in 1974 to today,[4] could have tendered the amount of its anticipated liability into court under Fed. R. Civ. P. 67 to stop or reduce the running of interest, it did not. It has never tendered any money into court and refused to tender any money to Plaintiffs between the 1979 liability finding and original judgment and the 1986 issuance

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[4] 1. On Aug. 22, 1979, when the original judgment in the amount of $5,445,000 against Kaiser was entered (J.A. 91), Kaiser did not tender that amount into court to stop or reduce the running of interest;

2. On Dec. 4, 1981, after the damage retrial requested by Kaiser, Kaiser did not tender the $9,567,939 judgment amount (J.A. 146) or any interest into court;

3. On Jan. 18, 1983, when the District Court reduced the amount of the judgment to $4.7 million (J.A. 184), Kaiser did not tender even that amount into court;

4. On Dec. 27, 1984, when the Court of Appeals ordered that the judgment amount be increased to $9,567,939 as determined by the jury (J.A. 210-11), Kaiser did not tender that amount or any interest into court;

5. On July 3, 1986, when Kaiser paid Plaintiffs $9,567,939 after issuance of the Court of Appeals' mandate, it did not tender into court any amount of interest to stop or reduce the continued running of interest;

6. On April 11, 1988, when the District Court awarded interest of $2,632,886 (Kaiser Pet. A-31, 56), Kaiser did not tender even that amount into court (*see* J.A. 59-60; R. 842-44);

7. On Jan. 9, 1989, when the Court of Appeals ordered that interest be awarded under the current version of 28 U.S.C. §1961 (Kaiser Pet. A-1), Kaiser did not tender into court either the $8.3 million or $12 million interest amount (see Plaintiffs' Opening Brief at 44 n.72; Kaiser Brief at 10).

of the Court of Appeals' mandate. To this day, it has refused to tender even one penny of interest to Plaintiffs.

In seeking an adequate award of interest, Plaintiffs do not seek to impose any new or additional obligations on Kaiser. Rather, they seek only to disgorge Kaiser's gain at Plaintiffs' expense in an amount in excess of $18.6 million. See Plaintiffs' Opening Brief at 7 & n.12.

C. NO RETROACTIVITY AT ISSUE: The Court Of Appeals' Decision Under Fed. R. App. P. 37 Awarding Interest On Its 1984 Judgment Does Not Present Any Issues Of Retroactivity

Contrary to Kaiser's mischaracterization of the issues (Kaiser Brief at 24-34), both the District Court and the Court of Appeals below considered the issue of appropriate interest on the Court of Appeals' judgment of December 27, 1984.[5] Prior to its entry, neither Plaintiffs nor Kaiser could have any vested right to rely on a particular rate of interest. The version of §1961 that Kaiser seeks to apply was repealed by Congress in 1982.

It was not until two years later (December 27, 1984) that the Court of Appeals judgment on the merits was entered; and not until four years later that this Courts' denial of certiorari on June 23, 1986 made it possible for the first time for Plaintiffs to compel partial payment of the amount owed.

Congress has repealed the version of 28 U.S.C. §1961 Kaiser seeks to apply today. That *repeal occurred long before any rights or obligations of the parties with respect to interest*

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[5] On June 24, 1986, prior to issuance of the Court of Appeals' mandate on its Dec. 27, 1984 judgment (which affirmed the 1979 liability finding and reinstated the full treble damage award of $9.5 million), Plaintiffs petitioned for instructions in the Court of Appeals' mandate with regard to interest under Fed. R. App. P. 37 and 28 U.S.C. §1961. (J.A. 75; R. 351-52). Pursuant to the stipulation of the parties approved by the Court of Appeals, the issue of the appropriate interest on the Court of Appeals' Dec. 27, 1984 judgment was referred to the District Court in the first instance. J.A. 75; Kaiser Pet. A-7, 865 F.2d at 568-69.

vested into matured and unconditional rights and obligations.[6] The court below found there was no issue of retroactive application of law in the present case:

> Bonjorno's right to receive interest [and accordingly Kaiser's obligation to pay any particular amount of interest] did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

Kaiser Pet. A-22, 865 F.2d at 575.

D. *NO MANIFEST INJUSTICE*: There Is No Manifest Injustice In Requiring A Wrongdoing Judgment Debtor To Pay Back To The Wronged Judgment Creditor, As Interest, The Benefits It Received From The Use Of The Creditor's Money

As Kaiser notes in its Statement of the Case on pages 9-10, the effect of the decision of the Court of Appeals is to award interest in the range of $8.5 or $12 million.[7] Given Kaiser's gain at its own cost of money of more than $18.6 million from the use of Plaintiffs' money, there is and can be no manifest injustice to Kaiser in the decision of the Court of Appeals.

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[6] Congress repealed the law Kaiser seeks to apply in 1982: *two years before* the 1984 judgment of the Court of Appeals on which Plaintiffs are entitled to interest (J.A. 210), *four years before* the issuance of the Court of Appeals' mandate in 1986 (J.A. 209), *six years before* the District Court decision on interest in 1988 (J.A. 58, 59), *seven years before* the Court of Appeals' decision below in 1989 (Kaiser Pet. A-1), and *eight years before* this Court will render its decision on interest in 1990.

[7] If interest were awarded under amended §1961 calculated back to the original judgment date of Aug. 22, 1979, interest would amount to approximately $11.9 million as of Aug. 3, 1989 under the Aug. 22, 1979 T-bill rate of 10.05%, compounded annually. *See* Plaintiffs' Opening Brief at 8 & n.14; *see also* J.A. 308.

The record is void of any evidence of manifest injustice to Kaiser or to public policy concerns. Kaiser has not attempted to point to any such evidence. *See* J.A. 1-311. The only record evidence establishes that Kaiser's undisputed gain and Plaintiffs' corresponding loss at commercial market rates of interest by delay in payment of the judgment was over $17 million as of the date of briefing before the Court of Appeals (J.A. 303).

The court below carefully considered and rejected Kaiser's contention that application of current law would result in manifest injustice, considering: (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. Kaiser Pet. A-21-23, 865 F.2d at 575-76.

The Nature And Identity Of The Parties

The court below first noted that failure to apply current law would undermine federal antitrust policy, and therefore the factor of the nature and identity of the parties "weighs heavily against finding manifest injustice":

> The plaintiffs in the present case are acting as private attorneys general in enforcing federal policy embodied in the antitrust laws. *See, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634-35 (1985) (stating that "[a] claim under the antitrust laws is not merely a private matter.") (citations omitted). We believe that an action to increase the rate at which post judgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interests. *But see Litton*, 746 F.2d at 175 [footnote omitted]. When antitrust plaintiffs serve the national interest by acting as private attorneys general in enforcing the antitrust laws, the congressional mandate that plaintiffs who prevail in such a suit be awarded treble damages should not be diminished by insufficient post judgment interest. Therefore, this factor *weighs heavily* against finding manifest injustice.

Kaiser Pet. A-21-22, 865 F.2d at 575 (emphasis added).

The Nature Of The Parties' Rights

The court below considered whether the application of amended 28 U.S.C. §1961 in this action, which was pending in the District Court as of the date of the amendment, " 'would infringe upon or deprive a person of a right that had matured or become unconditional.' " Kaiser Pet. A-22, 865 F.2d at 575 (quoting *Bradley*, 416 U.S. at 720). The court below recognized Plaintiffs' vesting argument in its statement that:

> Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

Id. Thus, the court below recognized that neither Plaintiffs nor Kaiser had any vested right to rely upon interest at any particular rate until a final controlling judgment was entered on the merits.

Nature Of The Impact Of The Change In Law Upon Those Rights

The court below, in addressing the third factor of manifest injustice, noted that the impact of changes in law on vested rights depended on whether " 'new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard.' " Kaiser Pet. A-23, 865 F.2d at 575 (quoting *Bradley*, 416 U.S. at 720). Analyzing this factor, the court noted:

> the fact that this case involves a judgment that was appealed long after the enactment date supports the position that imposition of the T-bill rate after the effective date does not constitute an unforseeable obligation.

The court went on to state:

> However, we go even further and hold that imposition of the T-bill rate [for the earlier period] would not constitute manifest injustice * * * [and] * * * hold that the amended version of section 1961

> applies as current law, regardless of whether interest begins to accrue under the statute prior to October 1, 1982.

Kaiser Pet. A-23, 865 F.2d at 575-76.

Thus the court below recognized that application of current law giving a closer approximation of the true cost of money did not impose any new or unanticipated obligations.

The court below concluded there was no manifest injustice in its narrow holding on the facts of the present case:

> In view of the nature and identity of the parties, the nature of their rights and the nature of the impact of the change in law on their rights, we conclude that application of the T-bill rate to the entire period does not result in manifest injustice.

Kaiser Pet. A-23, 865 F.2d at 576.

SUMMARY OF ARGUMENT

1. *POWER OF THE COURTS TO RECOGNIZE ECONOMIC REALITY*: For reasons fully developed in Respondents' Opening Brief as Cross-Petitioners in No. 88-1771 and summarized in section I below (pp. 12-14), only an award of commercial market rate interest for the full period from Plaintiffs' original judgment in 1979 will vindicate the fourfold purposes of interest awards.[8] Thus, in cases such as this,

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[8] In the present case, the fourfold purposes of interest are:

1. *To preserve* the value of the judgment and recognize economic reality.
2. *To prevent unjust enrichment* of the wrongdoer at its victim's expense.
3. *To vindicate* in *antitrust* cases congressional *policy* to ensure ample compensation to the victim and to deter the wrongdoer and others from unlawful conduct.
4. *To remove financial incentives for* exhaustion of post-trial and appellate remedies whereby the party delaying payment benefits from delay.

plagued with delays in the judicial process, not of Plaintiffs' making, a Court of Appeals has the power (inherent, equitable and under Fed. R. App. P. 37) to award adequate interest, over and above that provided under the current version of 28 U.S.C. §1961, to preserve the value of the judgment – and should exercise that power in this case.

The court below, while erring in failing to award commercial rates, correctly rejected Kaiser's contention that an entirely inadequate 6% interest rate should apply under a statute repealed two years before the Court of Appeals' judgment on the merits and four years before issuance of the mandate following this Court's denial of certiorari.

If this Court affirms Plaintiffs' position on its Cross-Petition, that the Courts of Appeals in cases such as this have power to award interest at commercial rates, it need not address any of the issues raised by Kaiser's unfounded claim of retroactive application of a federal interest statute for District Court judgments, 28 U.S.C. §1961, neither the repealed nor the current version of which controls this case.

2. *NO RETROACTIVITY AT ISSUE*: Kaiser's contention that this case turns on application of principles of retroactivity, as recently set forth by this Court in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988) (federal government rebuffed in attempt to retroactively deny millions of dollars of health care reimbursement payments to private hospitals that had relied on regulations authorizing them at time of expenditure), is absurd[9] and without factual or legal foundation.[10] Intervening procedural and remedial changes in

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[9] Kaiser contends that this Court's recent unanimous decision in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), which is based on 188 years of Supreme Court precedent, should be overruled because its "manifest injustice" analysis generates "unfair results." Kaiser Brief at 35.

[10] See p. 24 n.25 below, where Plaintiffs point out why the facts and legal issues in *Bowen* have nothing to do with the present case.

(Continued on following page)

law should be applied to pending cases unless such application would result in *manifest injustice* or there is statutory direction or legislative history contrary to application to pending cases. Where, as in the present case, *no vested rights or obligations* are affected by the change in law, there is no retroactivity and no manifest injustice to Kaiser in refusing its request that its interest obligations be determined by a repealed statute.

3. *KAISER'S IMPROPER RELIANCE ON A REPEALED STATUTE*: The law Kaiser seeks to apply was repealed by Congress over seven years ago precisely to prevent the result Kaiser asks this Court to impose: inadequate awards of interest at state law rates (6% simple) that *totally ignore economic reality* and fail to preserve the value of federal court judgments – thereby creating incentives to *overburden the federal courts* with repeated relitigation of the issues and allowing stays obtained in federal courts of equity to be abused as a vehicle creating *unjust enrichment* for adjudicated wrongdoers at their victims' expense.

4. *NO MANIFEST INJUSTICE*: The court below, while erring in failing to address, consider or exercise its powers to fulfill the purposes of interest by awarding full commercial market rates, nevertheless properly rejected Kaiser's belated attack[11] on the controlling, unanimous precedent of this Court (*Bradley v. School Board of Richmond*, 416 U.S. 696 (1974)) – followed by every other Court of Appeals addressing the applicability of amended 28 U.S.C. §1961 to pending cases –

(Continued from previous page)

Further, Kaiser, while reciting the word "retroactivity," *admits* that the current version of §1961 (T-bill rate) was the law in effect as of the date of a final controlling judgment on the merits. Kaiser Brief at 24 n.5. Thus, "* * * Kaiser agrees that the 1982 amendment to §1961 applies * * *." Kaiser's only argument in favor of application of the repealed version of §1961 is that the repealed version should apply because interest on the judgment is properly calculated commencing as of date earlier than 1982.

[11] *See* pp. 22-23 & n.23 below, where Plaintiffs note that Kaiser's attack on *Bradley* is out of time.

i.e., that current law applies unless manifest injustice would result. There is no manifest injustice in disgorging Kaiser's gain at Plaintiffs' expense from its delay in payment of the judgment since 1979.

There would be gross manifest injustice *to Plaintiffs* and the public policy considerations underlying the award of interest if Plaintiffs were limited to interest under Pennsylvania law and were not awarded interest at full commercial market rates for the entire period.

5. *THE EQUITIES AND PUBLIC POLICY*: Kaiser's gain, and Plaintiffs' loss, from Kaiser's use of Plaintiffs' money over the ten years since the original judgment is more than $18.6 million. Kaiser's contention that an entirely inadequate amount (either one day of interest or interest at 6% without any compounding: $2.6 million) should be imposed by this Court is one of incredible greed and an affront to one's sense of fairness, justice and right, as well as to the equity powers of the federal courts, which are charged with the duty of giving effect to the antitrust laws and rendering justice under the law. It is a blatant, unabashed request for this Court to take away from Plaintiffs – and give to the monopolistic predator that destroyed their business and their lives – $16 million of Plaintiffs' money.[12] Such unjust enrichment of adjudicated wrongdoers at their victims' expense cannot be condoned in courts of equity.

ARGUMENT

I. INTRODUCTION: THE COURTS' POWER TO AWARD FULL INTEREST

Plaintiffs' position as Cross-Petitioners is fully developed in their Opening Brief in No. 88-1771. There, Plaintiffs establish that their right to interest (which did not vest at least until 1984, when the Court of Appeals affirmed the 1979

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[12] $18.6 million less the $2.6 million of interest now proposed by Kaiser as an alternative to its contention that it only owes one day of interest.

liability and reinstated the full amount of the damage award), is *not* controlled by the federal interest statute, 28 U.S.C. §1961, for levy of execution of interest by the Marshal on routine judgments entered in the federal District Courts.

Therefore, it is of no consequence whether the *repealed* version which looked to state law (Pennsylvania 6% simple interest) as advocated by Kaiser, or the *current* version of 28 U.S.C. §1961 as amended in 1982 (T-bill rate – 2 to 3 points below prime, compounded yearly – 10.05% as of August 1979) applies.

Rather, where, as in cases such as this, there have been extraordinary delays in the judicial process, not of Plaintiffs' making, Courts of Appeals reinstating an earlier judgment have the equitable and inherent power, as well as power under Fed. R. App. P. 37, to award such rate of interest (at the commercial market rate: prime, compounded monthly) that will carry out the fourfold purposes of interest:

1. *Preserve* the value of judgments against erosion over time due to the time value of money at rates that recognize economic reality.

2. *Prevent* unjust enrichment where, as here, the defendant had the use of Plaintiffs' money at commercial market rates since liability first attached in 1979, and has benefitted by the use of such money by a sum in excess of $18.6 million.

3. *Vindicate* national trade regulation policy to amply compensate the wronged and to deter the wrongdoer and others from future unlawful action.

4. *Discourage* litigants from overlitigating and attempting to benefit from delays by accumulating interest at market rates while exhausting their judicial remedies.

In this brief, Plaintiffs address Kaiser's contentions that the old version of 28 U.S.C. §1961, repealed by Congress in 1982, controls. Only if this Court were to conclude that there is no power in the Courts of Appeals to award commercial

market rates,[13] would any of the arguments advanced in this brief favoring application of the current federal interest statute (as determined by the court below) over the repealed statute have any relevance or bearing on the final award of interest in this case.

In sum, all of the issues raised by Kaiser, including (1) whether the Court should apply a repealed statute and (2) its vacillating position[14] on the *Bradley* rule regarding application of current law, are irrelevant. They need not be reached by this Court to decide this case.

As Plaintiffs have demonstrated in their Cross-Petition Brief, awards of interest by the Courts of Appeals are not controlled by the federal interest statute for levy of execution for interest calculated by the marshal on routine federal District Court judgments. Rather, the Courts of Appeals have power, and respectfully should, in cases such as this, award the appropriate interest that will carry out the fourfold purposes of interest discussed above.

II. THE COURT BELOW CORRECTLY REJECTED KAISER'S REQUEST TO APPLY A STATUTE THAT HAD BEEN REPEALED BY CONGRESS SPECIFICALLY TO PREVENT THE RESULT SOUGHT BY KAISER: INADEQUATE AWARDS OF INTEREST UNDER STATE LAW ON FEDERAL COURT JUDGMENTS

A. VESTING OF INTEREST CLAIMS: Since Claims For Judgment Interest Are Contingent Until A Final Controlling Judgment Is Entered, Neither Side Has A Vested Right To Receive Or Obligation To Pay Interest While There Is Ongoing Litigation On The Underlying Merits Of A Case

Plaintiffs had no unconditional claim for judgment interest (and Kaiser had no unconditional obligation to pay such

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[13] Even under the equity of §1961, as the Tenth Circuit held, the courts "ha[ve] discretion to keep the rates in accordance with the real world." *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 28 (1988); *see also* Plaintiffs' Opening Brief at 39 & n.60.

[14] See pp. 22-23 & n.23 below.

interest) until all litigation on the merits had ended in Plaintiffs' favor. If the Defendant had prevailed on the merits, Plaintiffs would never have had a claim for interest. The claim for judgment interest ripened only as of this Court's denial of certiorari on the Court of Appeals' judgment on the merits in 1986. *At that time*, for the first time, Plaintiffs could and did claim judgment interest. The rule and statute then in effect were Fed. R. App. P. 37 and the current §1961. There was no change in law while the claim for judgment interest was pending. The law has not changed since the claim for judgment interest ripened. Therefore, there is no retroactivity at issue, and no basis whatsoever to apply a law repealed before the interest claim matured.

1. The Right To Interest Does Not Vest Until A Final Controlling Judgment Is Entered On The Merits

The court below correctly held that the award of interest in this case does not involve any issues of retroactive application of any statute. Kaiser Pet. A-17, 865 F.2d at 573. The version of the federal statute for routine District Court judgments in effect when the right to interest vested[15] was the current version of 28 U.S.C. §1961, providing for interest at T-bill rates, not the version looking to state law repealed by Congress in 1982. *See* Reitz, *Interest on Judgments In Federal Litigation, 28 U.S.C. §1961*, J.A. 212 at 215-17, 267-76.[16]

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[15] To the extent 28 U.S.C. §1961 essentially provides a remedy ancillary to execution on and enforcement of a District Court judgment, the version applied should be that in effect as of the date the remedy of interest is sought. *See* Fed. R. Civ. P. 69(a) ("The procedure on execution * * * shall be in accordance with the practice and procedure of the state * * * *existing at the time the remedy is sought*, except that any statute of the United States governs to the extent it is applicable.") (emphasis added).

[16] Reproduced in the Joint Appendix, beginning at J.A. 212, is a scholarly analysis of application of 28 U.S.C. §1961 in federal litigation

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It is well established that the right to receive and the obligation to pay interest on a judgment (whether ordered pursuant to the inherent or equitable power of the court or under Fed. R. App. P. 37 or 28 U.S.C. §1961) does not vest into a matured or unconditional right at least until after entry of a final controlling judgment on the merits – which did not occur in the present case until well after 1982. *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 167-68 (1933);[17] *cf. Morley v.*

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prepared by Curtis R. Reitz, Algernon Sydney Biddle Professor of Law University of Pennsylvania, at Plaintiffs' request in October 1986, which Plaintiffs submitted to the courts below. There at pages J.A. 235 through J.A. 239, he cogently describes with great clarity the vesting concept. References to Professor Reitz', analysis are set forth as "Reitz, J.A. ___."

[17] In *Funkhouser*, this Court held that parties to contracts and to litigation *do not have vested rights to avoid paying adequate interest under intervening law* enacted prior to a final controlling judgment. 290 U.S. at 167-68. This Court affirmed the holding that a State statute required interest on judgments for breach of contract even when the contract being enforced predated the interest provision.

In language particularly relevant to the present case in which Plaintiffs merely seek an adequate award of interest as a remedy ancillary to their judgment for Kaiser's fifteen-year-old violation of the antitrust laws, the Court noted that:

> "To enact laws providing remedies for a violation of contracts" and "to alter or enlarge those remedies from time to time," was within the competency of the legislature.
>
> * * * *
>
> The parties make their contract with reference to the existence of the power of the State to provide remedies for enforcement and to secure adequate redress in case of breach.

Id. (citations omitted). *Cf. Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912) ("A person has no property, no vested interest, in any rule of the common law. * * * Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature unless prevented by constitutional limitations.) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

Lake Shore & M.S. Ry Co., 146 U.S. 162 (1892) (discussed below at n.18). As of 1982, this case was still pending in the District Court on Kaiser's post-trial motions on the merits.

2. Kaiser Had No Vested Right To Avoid Paying Adequate Interest

Kaiser improperly views the entry of a judgment against it in 1979 as an event giving it a vested right to delay execution of the judgment for as long as possible so that it could benefit from a sub-market interest rate. That perverse position ignores:

(1) the inherent and equitable power of the courts to award adequate interest (See Plaintiffs' Opening Brief);

(2) the lack of any unconditional right to receive or avoid paying adequate interest on a judgment that is not a final controlling judgment (see pp. 14-16 above);

(3) the distinction between the final controlling judgment vesting rights and obligations and an interim judgment that sets the date back to which interest should be calculated; and

(4) the lack of any vested right to continue to avoid paying any particular rate of interest even after entry of a final controlling judgment.[18]

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[18] Kaiser's contention that a repealed statute governs the rate of interest is a request for this Court to overrule 100 years of its well established precedent that the parties to a judgment have no *vested right* to continued application of any particular rate of interest on a judgment, *even after that judgment has become a final controlling judgment after the expiration of all appeals. E.g., Morley v. Lakeshore & M.S. Ry Co.*, 146 U.S. 162, 168-69 (1892); *see also Missouri & Ark. Lumber & Mining Co. v. Sebastian County*, 249 U.S. 170, 172-73 (1919); *Spang Indus. Inc. v. Aetna Cas. & Sur. Co.*, 512 F.2d 365, 371-72 (2d Cir. 1975); *Shook & Fletcher Insulation Co. v. Central Rigging & Contracting Corp.*, 684 F.2d

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In complex litigation, there are frequently a number of judgments entered. Thus, as Professor Reitz notes, because the claim for interest does not mature until the merits are resolved, one should look to the final controlling judgment on the merits to determine a party's right to receive interest as provided by the *applicable* law at that time. This judgment is not necessarily the same as the "judgment" that determines the *time period* for the running of interest.[19] *See* Reitz, J.A. 236-38; *cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1026 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985).[20]

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1383, 1388-89 (11th Cir. 1982) (where statutory rate of interest changed after judgment, party owing damages "has no vested right to a continued 7% rate of interest on judgments entered against it; the rate of interest is a creature of statute, not contract"). *But see Litton Sys., Inc. v. AT&T, Inc.*, 746 F.2d 168, 170, 175-76 (2d Cir. 1984) (defendant had a right to continued interest at old rate where parties had stipulated to that rate as a matter of contract).

Kaiser has no vested right to a certain rate of interest even after the judgment is final and collectable. *A fortiori*, no such *vested* right existed *before* the entry of a final controlling judgment.

[19] Indeed, the first sentence of Fed. R. App. P. 37 specifically dictates that court awarded interest *must* run as of a date prior to entry of the final controlling judgment in certain circumstances.

Some federal courts use amended §1961 to determine the rate of prejudgment interest, *see, e.g., Columbia Brick Works, Inc. v. Royal Ins. Co.*, 768 F.2d 1066, 1071 (9th Cir. 1985), but the calculation of such interest over periods dating back before 1982 does not raise issues of retroactivity.

[20] Kaiser places heavy and entirely unfounded reliance on *United States v. Magnolia Petroleum Co.*, 276 U.S. 160 (1928), in which the Court considered the application of a 1924 amendment to the Revenue Act of 1921 that changed the starting date for interest on tax overpayments. Because the Commissioner had given final approval for the specific amount of the refund by issuing an "allowance" *before* the amendment was enacted, all rights and obligations with respect to interest had become unconditional under prior law.

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Under an equitable construction of 28 U.S.C. §1961, a final controlling "judgment" entered in the District Court after 1982 can and should, by force of law under amended 28 U.S.C. §1961, carry with it, as a bare minimum, the entitlement to interest calculated from an earlier date – the "judgment" of August 22, 1979.

The court below, while erring in failing to award full market rates, properly understood these fundamental concepts

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Kaiser incorrectly argues that the allowance date as of which interest *ends* in *Magnolia* (276 U.S. at 162) fell before the amendment to the IRS interest provision and that compares to the date as of which interest *begins* in the present case falling before the 1982 amendment to the federal District Court interest provision. Kaiser's incorrect contention that *Magnolia* "is directly analogous to this case" (Kaiser Brief at 28) ignores the holding that the allowance of the refund made the taxpayer fully "entitled" to interest according to the *rule then in force*. *Id.* at 162 (citing *Blair v. Birkenstock*, 271 U.S. 348, 350 (1926)). In the present case, in stark contrast, the final controlling judgment on the merits, which vested rights to interest, was not entered until long after 1982.

In *Blair*, unlike *Magnolia*, the Court applied the new interest provision contained in the 1924 amendment, rather than the old interest provision in the 1921 Act. The right to receive interest became unconditional on the IRS "allowance" date. This Court held that as "this date was subsequent to the enactment of §1019 of the Revenue Act of 1924, the allowance of interest must be in accordance with that section, not §1324 of the Act of 1921 which has been repealed." 271 U.S. at 350-51. *In both cases, interest started running prior to the enactment of the new interest provision in the 1924 Act!* In *Magnolia* the old interest provision applied because the date of allowance, when the interest stopped running and the right to interest vested and became unconditional, occurred prior to the enactment of the new interest provision, while in *Blair* the new interest provision applied because the vesting date occurred after its enactment.

The present case is analogous to *Blair*, rather than to *Magnolia*. Plaintiffs are entitled to interest over a period starting before the 1982 amendment to §1961, but the right to interest did not mature or vest until long after that amendment. Thus, as in *Blair*, the right to interest did not mature or become unconditional until after the new interest provision had taken effect, and interest certainly did not stop running before that change.

of vesting of rights which are central to a resolution of any issues of "retroactivity" and "manifest injustice." Kaiser, however, attempts to ignore this fundamental legal doctrine of "vesting" of rights in constructing its illusory argument of retroactivity to deny the Plaintiffs a compensatory rate of interest. As Plaintiffs point out below, Kaiser's contentions that the amendment to §1961 was intended to be "prospective" only (see Kaiser Brief at 14-17) is not only patently wrong, but is also irrelevant – since the right to receive interest did not *vest* until long after the new interest statute became effective (i.e. October 1, 1982).

B. THIS COURT'S *BRADLEY* ANALYSIS IS SOUND: Kaiser, In Its Attempt To Benefit From A Repealed Statute, States No Basis For Overruling The Longstanding And Unanimous Precedent Of This Court – That Intervening Remedial Or Procedural Changes In Law That Do Not Affect Vested Rights Apply To Pending Cases

1. Under *Bradley v. School Board Of Richmond*, Courts Should Apply The Law In Effect As Of The Time Of Decision

In *Bradley v. School Board of Richmond*, 416 U.S. 696, 710-711 (1974), this Court, in a unanimous[21] opinion authored by Mr. Justice Blackmun, held that a new statute mandating attorney fee awards should be applied in a case in which "the propriety of a fee award was pending resolution on appeal when the statute became law." The Court so held, notwithstanding the defendant's contentions of "retroactivity" because fees were awarded for services incurred prior to the enactment.

This Court in *Bradley* "anchor[ed] [its] holding" on the *longstanding principle* dating back to Mr. Chief Justice Marshall's statements in *United States v. Schooner Peggy*, 1

[21] Justices Marshall and Powell took no part in consideration of the case.

Cranch (5 U.S.) 103 (1801),[22] which provides the framework for analyzing Kaiser's contention that a repealed statute, rather than current law, should apply to Plaintiffs' interest award:

> the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Bradley, 416 U.S. at 711.

Statutory Direction

With respect to "statutory direction" this Court in *Bradley* noted that its prior decision in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), clarified any

[22] In the seminal case of *Schooner Peggy* Mr. Chief Justice Marshall set forth the principle that "if subsequent to the judgment and before the decision of the Appellate Court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligations denied." 1 Cranch (5 U.S.) at 110.

See also Maryland v. Baltimore & O. Ry. Co., 3 How. (44 U.S.) 534, 552 (1845) (refusing to apply statute that had been in effect at time suit instituted, but had been repealed while case was pending); *Dinsmore v. Southern Express Co.*, 183 U.S. 115, 120 (1901) (refusing to apply statute to respondent where statute had been amended to exempt express companies while the case was pending before the Supreme Court); *Gulf Colorado & S.F. Ry Co. v. Dennis*, 224 U.S. 503, 506 (1912) (reversing award of attorney's fees where state law authorizing fees was invalidated by state supreme court while case was pending); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, 27 (1940) (applying statute as amended during appellate review to reclassify plaintiffs' judgment as one entitled to priority in bankruptcy); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 541 (1941) (reversing dismissal of plaintiff's complaint because state supreme court decision rendered while case was being reviewed recognized basis for claims); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (citing *Thorpe* and *Bradley* in concluding that state appellate court should consider petitioner's argument that it was entitled to jury instruction under new caselaw decided during appeal).

uncertainty "that even where the intervening law does not explicitly recite that it is to be applied to *pending cases*, it is to be *given recognition and effect*." *Bradley*, 416 U.S. at 715 (emphasis added).

Legislative History

As this Court stated in *Bradley*, "insofar as the legislative history * * * is supportive of either position, it would seem to provide at least implicit support for the application of the statute to pending cases." *Bradley*, 416 U.S. at 716 (footnotes omitted).

Manifest Injustice

Finally, in *Bradley* this Court set forth the basic factors to be analyzed in deciding whether to decline to apply current law, if doing so might work manifest injustice on private parties:

> The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.

416 U.S. at 717.

2. Kaiser's Belated Attack On The *Bradley* Analysis Is Illfounded And Disingenuous

Kaiser's Arguments Are Barred By Its Reliance On Bradley *Below*

In an extraordinary about-face from its principal argument below – *i.e.*, that "the District Court *correctly applied* * * * *Bradley v. School Board*, 416 U.S. 696 (1974)." (Kaiser's Third Circuit Brief at 22 (emphasis added)) – Kaiser now contends before this Court, that the *Bradley* analysis does *not*

apply to this case,[23] or that 188 years of precedent and this Court's unanimous decision in *Bradley* should be overruled,[24] based in part on this Court's recent decision in *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988), – a case whose facts and legal issues do not remotely bear on the instant case.[25]

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[23] Kaiser contended for the first time in its Petition for Rehearing in the Third Circuit that the *Bradley* analysis *it asked the court to apply* was improperly adopted and applied in this case.

As Plaintiffs pointed out in their Brief Opposing Kaiser's Certiorari Petition at 12, Kaiser's new argument is foreclosed by its failure to raise those contentions below. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (issue first raised in response to Motion for Reconsideration in Court of Appeals was precluded from consideration by this Court); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

[24] Faced with the undeniable result of application of *Bradley* on the facts of this case, Kaiser is compelled to fall back on the *extreme and misbegotten position that this recent unanimous decision based on 188 years of Supreme Court precedent should be overruled because its "manifest injustice" analysis generates "unfair results"!*

[25] Kaiser's suggestion that *Bowen* altered the law and excuses the dramatic change in its position is disingenuous:

(1) Neither the majority nor the concurring opinion in *Bowen* mentions or cites *Bradley* or *Schooner Peggy*. *Bowen* did not involve any issues bearing on those holdings. It involved rights of health care providers to reimbursement that were mature and unconditional under an unappealed District Court judgment prior to the Secretary's attempt to change HHS regulations. 109 S. Ct. at 471.

(2) *Bowen* involved an attempt by the Secretary of HHS to deny retroactively (after $2 million of reimbursable costs were incurred by private institutions in reliance on rules providing for reimbursement) reimbursements to health care providers pursuant to new rules. *Id.*

(3) Those new rules would have overruled a decision by the United States District Court that the Secretary had to make the reimbursements. *See id.* at 470-71. Instead of appealing the District Court judgment, the Secretary let the time for appeal run and simply issued new regulations denying the reimbursement the court had ordered. *Id.* at 471.

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Kaiser's Absurd Reasoning That Analysis For Manifest Injustice Produces Unfair Results

In a further astounding exercise in sophistry, Kaiser contends that the manifest injustice analysis of this Court in *Bradley* is "unworkable and unfair." It makes the remarkable, self-contradictory contention that the analysis "depends on individual case circumstances showing the presence or absence of 'manifest injustice'" and therefore produces "unfair results." Kaiser Brief at 35. Its attack on the fairness the manifest injustice analysis in *Bradley* flies directly in the face of the undisputed equities in this case of Kaiser's $18.6 million gain at Plaintiffs' expense from the ten years of delay since entry of the original judgment in 1979.

Kaiser criticizes the application of *Bradley* as arbitrary and unfair because the manifest injustice analysis could result in applying different versions of §1961 to cases in which interim judgments or verdicts are entered on the same day, where the final controlling judgment, in one case may be entered before 1982; – and in another case may not be entered until after 1982. Kaiser Brief at 35. There is nothing arbitrary or unfair in such results because:

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(4) The Secretary's attempt to deny retroactively reimbursements for costs already incurred was directly contradicted and prohibited by Congress in its statutory grant of rulemaking authority:

> the House and Senate Committee Reports expressed a desire to forbid retroactive cost-limit rules: "The proposed new authority to set limits on costs * * * would be exercised on a prospective, rather than retrospective, basis *so that the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable*." H.R. Rep. No. 92-1230, p. 83 (1971).

109 S. Ct. at 474 (emphasis added).

(5) The Secretary had abused the *limited grant of rulemaking power* in an attempt to impose his will over that of the Congress and over the power of the federal courts. *Id.* at 472-73.

1. Until a judgment is final and collectible, it continues to be subject to modification or reversal by the court, and the claim for interest and obligation to pay interest is not ripe or matured. (See pp. 14-20 above).
2. There is no vested right to rely on any particular rate of interest even after entry of a final controlling judgment. (See p. 17 & n.18 above).
3. The *Bradley* manifest injustice analysis, discussed below, provides flexibility and discretion specifically to prevent the application of new law to pending cases where the result would be *manifestly unjust. See, e.g., Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168, 175-76 (2d Cir. 1984).

The Bradley *Analysis Properly Affords Protection To Vested Property Rights*

The principle that courts should, as a general matter, apply current law and not law that has been repealed – (as well as the principle reaffirmed in *Thorpe* that intervening law should be applied to pending cases) is consistent with the separation of powers doctrines set forth in the Constitution. If the courts have already made a final determination of the rights and obligations of the parties through entry of a final controlling judgment,[26] or if a state legislature or some other body of positive law[27] secures a *vested property right* in the

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[26] Kaiser relies on *Greene v. United States*, 376 U.S 149 (1964), but disregards the final controlling judgment prior to change in law that created vested rights in *Greene*. As the court in *Thorpe* noted, Greene's "right to recover lost pay for a wrongful discharge was 'vested' as a result of our earlier decision in *Greene v. McElroy*, 360 U.S. 474 (1959)." *Thorpe*, 393 U.S. at 282 n.43.

[27] *Union Pacific Ry. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (state statute of limitations that affected railroad land rights not applied where it "interferes with antecedent rights," absent specific legislative intent).

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hands of private parties,[28] then the Congress may not alter those vested rights through legislation without making a proper declaration of retroactivity, and without acting for a proper legislative purpose.

Kaiser Improperly Attempts To Create Discord Where This Court Finds Harmony

In an attempt to create a spector of confusion among Supreme Court precedent, Kaiser throughout its brief entirely ignores the fundamental distinction between two different categories of cases:

> (1) those like this case that involve application of current law to cases pending in the courts when a change of law occurs, *e.g.*, *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and
>
> (2) cases of true *retroactivity*, where application of new law defeats vested property rights or would amount to collateral attack on a final controlling judgment, *e.g.*, *Bowen v. Georgetown University Hospital*, 109 S. Ct. 468 (1988).[29]

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In *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), this Court considered the retroactive application of a section of the 1978 Bankruptcy Act which excluded household items from *creditors' liens that were perfected prior to the enactment*. The Court invalidated the retroactive application of this new provision because it impaired "antecedent rights" that were fully vested prior to the enactment of the new statute. *Id.* at 79.

[28] This Court in *Thorpe* noted that the courts might refrain from application of current law if such application would result in "manifest injustice" by altering vested property rights of private parties. *Thorpe*, 393 U.S. at 282 & n.43.

[29] The seminal case in this line is *United States v. Heth*, 3 Cranch (7 U.S.) 399 (1806), in which the Court declined to apply a change in commission rates for customs collectors retroactively. Mr. Justice

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As recently as 1985, this Court has reiterated the harmony between application of current law under *Bradley* and "*another venerable rule* of statutory interpretation" disfavoring retroactive legislation defeating vested rights:

> [*Bradley*] rested on the general principle that a court must apply the law in effect at the time of its decision, see *Schooner Peggy*, 1 Cranch 103 (1801), which *Bradley* concluded holds true even if the intervening law does not expressly state that it applies to pending cases. 416 U.S. at 715. *Bradley*, however, expressly acknowledged limits to this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 720. *This limitation comports with another venerable rule of statutory interpretation*, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Bennett v. New Jersey, 470 U.S. 632, 639-40 (1985) (emphasis added).

Lower Courts Agree On Application of Bradley *To §1961*

Contrary to Kaiser's suggestion of confusion in the lower courts (Kaiser Brief at 34-37), every Court of Appeals that has given any serious consideration to which version of §1961 to apply, where interest is calculated back to a date prior to the effective date of the amendment, has held that the issue is determined under the *Bradley* analysis, at least as

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Paterson, quoted in Kaiser Brief at 26, stated that statutes should not be construed to "interfere with * * * antecedent rights * * *" *Id.* at 413 (Paterson, J.). Mr. Justice Cushing, interpreting the change in law, concluded that it was not intended "to have retrospective effect, to *divest vested rights* of the collector * * *" *Id.* at 414 (Cushing, J.) (emphasis added).

long as the *final controlling judgment* on the merits was not entered *before* October 1, 1982.[30] Even the Second Circuit in *Litton*, on which Kaiser relies heavily,[31] found that the *Bradley* analysis applied to determine the applicability of the amendment of 28 U.S.C. §1961 to pending cases. *Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168, 172 (2d Cir. 1984).

C. THE *BRADLEY* FACTORS APPLIED TO THIS CASE: Kaiser Fails To Point To Any Evidence Bearing On The *Bradley* Factors (Statutory Direction, Legislative History Or Manifest Injustice) That Would Require Or Permit Awarding Interest Pursuant To A Statute (28 U.S.C. §1961) Repealed By Congress To Prevent The Very Vice Kaiser Seeks To Unjustly Benefit From

In contending that "retroactivity" is at issue, Kaiser refuses to recognize that the court below followed this Court's clear and cogent analysis of the distinction in *Bradley* between 1) retroactive application of new law to defeat vested property rights; and 2) application of current law to an open issue still pending in the court as in this case:

> In *Bradley*, Justice Blackmun, writing for a unanimous Court, *cautioned that the issue was not*

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[30] *Bailey v. Chattem, Inc.*, 838 F.2d 149, 155 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Campbell v. United States*, 809 F.2d 563, 569-76 (9th Cir. 1987); *Brooks v. United States*, 757 F.2d 734, 741-43 (5th Cir. 1985); *Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168, 172-76 (2d Cir. 1984); *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *cf. Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989) (final controlling judgments entered *prior* to October 1, 1982 controlled by former law where judgment creditors subsequently sought to collaterally attack final controlling judgments). ***But see Merit Ins. Co. v. Leatherby Ins. Co.***, 728 F.2d 943, 944 (7th Cir. 1984) (per curiam) (no analysis): *United States v. Dollar Rent-A-Car Sys., Inc*, 712 F.2d 938, 940 n.5 (4th Cir. 1983) (dicta in footnote).

[31] As discussed below, pp. 37-38 & n.45, Kaiser has presented no evidence of "manifest injustice" such as that found on the facts of *Litton*.

> *whether the fee statute applied "retroactively"* to fees for services rendered prior to enactment, but rather whether a fee award was justified by current law. He states:
>
> > The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of §718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.
>
> 416 U.S. at 710.

Kaiser Pet. A-17 n.15, 865 F.2d at 573 n.14 (emphasis added). Thus, the court below found no conflict between application of the *Bradley* rule to the present case and true retroactivity (as was the case in *Bowen*, see p. 23 & n.25 above):

> a statute is not "retroactive" simply because facts from the pre-enactment period are implicated. The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law.

Kaiser Pet. A-17, 865 F.2d at 573 (citations omitted).

There is no question that the amended version of 28 U.S.C. §1961 was in effect on the date of the Court of Appeals' judgment on the merits in 1984 and was still in effect in 1986 when this Court denied certiorari and the Court of Appeals mandate finally issued. Until that date, Plaintiffs were precluded from executing on the judgment, or securing any benefits therefrom, and there was no unconditional claim for, or obligation to pay, interest.

Kaiser's incorrect characterization of "retroactivity" is all-the-more mistaken, because the change in §1961 did not affect Kaiser's *substantive* liability for its intentional violation of antitrust law. Rather, it dealt only with the ancillary matter of insuring adequate interest to preserve the value of

judgments.[32] The current version of §1961 (as well as the Courts of Appeals' inherent, equitable and Rule 37 power to award adequate interest) was the law when the District Court issued its ruling on interest in 1988, when the Court of Appeals issued its ruling on interest in 1989 and presumably will be the law when this Court issues its ruling in 1990. Accordingly, *there is no issue of retroactive application of any law.*

Similarly, as discussed below, Kaiser's attack on the Court of Appeals' application of the threefold *Bradley* factors is without merit.

1. STATUTORY DECLARATION: Congress Repealed The Law Kaiser Seeks To Apply Today Long Before Any Rights Or Obligations On Interest Vested

Disregarding the language of the statute and the express intent of Congress in the legislative history, Kaiser argues without basis that there were "clear indications from both the language of the statute and the legislative history" supporting its request to apply a repealed statute, four years after the repeal.[33] Kaiser Brief at 17.

Kaiser incorrectly posits that the six month delay from the enactment of the amendment to the effective date implies that Congress intended that state law rates of interest would

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[32] *Cf. Bradley*, 416 U.S. at 710, noting that no final controlling judgment on the collateral issue of attorney's fees had been entered at the time the relevant statute was amended, just as no final controlling judgment exists yet in this case on the applicable rate of interest.

[33] Kaiser's "prospective" contentions are irrelevant, as it contends "that Congress intended that amended §1961 should apply * * * to the calculation of postjudgment interest on judgments entered *after* its effective date." (emphasis supplied). Kaiser Brief at 17-18. Thus, Kaiser concedes that Congress did not intend that the repealed statute would apply to judgments, such as the relevant final controlling judgment in this case, which were entered well after 1982.

apply to pending cases in which a final controlling judgment was not entered until long after 1982. Kaiser Brief at 14-18. Kaiser's interpretation ignores the concept of vesting and ignores the basic thrust of the Federal Courts Improvement Act (*FCIA*), of which the amendment to § 1961 is only a small part and which required a six month delay to allow time to reorganize the federal court system.[34] *See* Reitz, *Interest On Judgments*, J.A. 267 & n.42.

Kaiser attempts to incant an arbitrary rule that the T-bill rate does not apply to judgments entered before October 1, 1982.[35] There is no basis in the language of the statute to find

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[34] The FCIA enacted a major restructuring in the federal court system, including:

1) replacing the old Court of Claims and Court of Customs and Patent Appeals with the new Federal Court of Appeals;
2) merging the clerks offices for the abolished courts;
3) creating the new United States Claims Courts, including 16 new Article I judgeships; and
4) *transferring all pending cases* from the abolished courts to the Federal Court of Appeals *as of the effective date of the FCIA.*

See generally S. Rep. No. 97-275, 97th Cong. 2d Sess. at 2-12, *reprinted in* 1982 U.S. Code Cong. & Admin. News, at 12-22. Kaiser contends that an Act transferring pending cases was not intended to apply to pending cases.

[35] Kaiser's circular contention ignores the issue presented in this case regarding multiple judgments. As lower courts have noted, Kaiser's

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that Congress would have intended that interest on a 1984 Court of Appeals judgment (not recoverable until 1986) should be set at a ridiculously low and inadequate state law rate, pursuant to the very version of §1961 Congress repealed

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argument is based not on the language of the statute, but on misconceptions of the Admin. Office of the U.S. Courts. *Compare* Kaiser Brief at 23 *with Campbell*, 809 F.2d at 569 n.4. Kaiser's interpretation has been rejected by the Third, Fifth, Sixth, Eighth and Ninth Circuits.

Some courts, such as the court below, Kaiser Pet. A-16, 865 F.2d at 572, and the Eighth Circuit in *R.W.T. v. Dalton*, 712 F.2d 1225, 1235 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), have simply recognized that the applicable law is determined as of the date of the final controlling judgment, not as of the date back to which interest is calculated.

Other courts, either pursuant to the agreement of the parties (*Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820, 821 (N.D. Cal. 1982), *aff'd* 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985)) or at the request of the party seeking interest (*Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987)) have determined that a state law rate of interest should apply for the period up to October 1, 1982 and that a T-bill rate of interest should apply for periods of interest thereafter.

The Fifth Circuit has adopted a unique approach that the state law rate of interest should apply for periods of interest up to the date of the entry of the first "judgment" entered after October 1, 1982, and that a T-bill rate should apply for periods of interest calculated after the first such judgment. *See Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613 (5th Cir. 1988); *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111 (5th Cir. 1985).

The Second Circuit in *Litton Sys., Inc. v. AT&T, Inc.*, 746 F.2d 168 (2d Cir. 1984), held on the facts of that case that a state law rate of interest governed for interest calculated over a period subsequent to October 1, 1982, based on the parties' *stipulation* that the state law rate of 9% would apply – warranting a finding of "manifest injustice" in the application of a different rate. (See pp. 37-38 & n.45 below).

After a number of years of debate in the courts, the last court to rule on application of amended §1961 to pending cases reached the same conclusion as the first – as the court below correctly recognized there is no manifest injustice in application of current law to provide a more adequate rate of interest.

in 1982, precisely to override such insufficient state law rates.[36]

2. LEGISLATIVE HISTORY: The Legislative History Of The Amendment To §1961 Demonstrates A Clear Intent To Avoid The Very Result Sought By Kaiser: Inadequate Interest Under State Law To Preserve The Value Of Federal Court Judgments

In 1982, Congress determined that state law interest rates such as Pennsylvania's statutory 6% simple interest[37] were inadequate to carry out the purposes of interest on judgments in federal District Court under §1961. Congress established national rates more closely approximating the contemporary cost of money to correct in part the very vice Kaiser seeks to perpetuate. This purpose was clearly stated in the Senate Report on the 1982 amendments to §1961:

> Under current law, the interest rate on judgments in Federal Courts is based on varying State laws and frequently falls below the contemporary cost of money. [The proposed amendment] sets a realistic and nationally uniform rate of interest on judgments in the Federal courts that would be keyed to the *prime interest rate*[38] as determined by the Internal Revenue Service.

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[36] See pp. 33-34. Congress is presumed not to intend an absurd or unfair result. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *United States v. American Trucking Ass'n, Inc.*, 310 U.S. 534, 543 (1940); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

[37] *See* Note, *The Postjudgment Interest Rate: Ignoring Reality For Too Long*, 23 Duq. L. Rev. 1083, 1083-84 (1985) (Pennsylvania's rate "represents the lowest non-variable postjudgment interest rate applied in the United States, both in the state and federal courts. At best, this represents a legislative oversight by the Pennsylvania Legislature; at worst, it is indicative of a * * * failure to grasp the realities of the modern economic world * * * .") (footnotes omitted), *quoted by the court below*, Kaiser Pet. A-20 n.18, 865 F.2d at 574 n.17.

[38] (Emphasis added). As noted in Plaintiffs' Opening Brief at 43 n.70, T-bill rates (2 to 3 points below commercial prime) were substituted

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The Senate Report went on to stress one of the principal policy purposes of adequate interest awards is to avoid any economic incentive for delay:

> This eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award *at the commercial rate* during the pendency of the appeal.

S. Rep. No. 275, 97th Cong., 2d Sess., at 11, 1982 U.S. Code Cong. & Admin. News 11, 21 (emphasis added).[39] The concept behind this remedial legislation should be applied in the present case to avoid the injustice Congress intended to remedy.

Accepting Kaiser's position that its interest obligation is limited to 6% simple interest would reward Kaiser for its predatory conduct and allow it to retain the benefits of holding Plaintiffs' money during the pendency of litigation. That result would be expressly contrary to the purpose of interest awards under §1961 and the remedial legislative intent of Congress. *Cf. Campbell*, 809 F.2d at 574.

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at the request of the government on the ground that its cost of money is significantly below prime.

[39] A similar sentiment was expressed by the President in February 1979, in proposing the amendment to §1961:

> Current federal law *** permits *unrealistically low* as well as conflicting *rates of interest* while the decision is under appeal. Yet such interest may be essential in order to truly compensate the plaintiff or to avoid the unjust enrichment of the defendant. *** If a judgment on appeal is entered at a rate well below the prime interest rate, the losing party may well profit from the appeal.

H.R. Doc. No. 96-59, 96th Cong., 1st Sess. 4 (1979) (emphasis added).

3. MANIFEST INJUSTICE: Kaiser Did Not And Could Not Present Any Evidence Of Manifest Injustice In Support Of Its Contention That A Repealed Law Controls Its Interest Obligations

The court below correctly found that there is no "manifest injustice" that would justify Kaiser, an adjudicated antitrust predator, to pay only 6% simple interest under a law repealed four years before the Court of Appeals' mandate issued on its judgment on the merits.

(a) *Nature And Identity Of The Parties:* Current Law Should Be Applied To Carry Out Plaintiffs' Private Attorney General Role

Kaiser makes the preposterous contention that no issues of national concern are implicated when an antitrust violator seeks to avoid paying two-thirds of the award against it and to nullify the private attorney general role of Plaintiffs, contrary to this Court's specific holding in *Bradley*.[40] Kaiser Brief at 18-19.

The first factor of the manifest injustice analysis, *the nature and identity of the parties*, is principally concerned with distinguishing purely private disputes from cases that implicate broader national concerns. *See Bradley*, 416 U.S. at 717 (citing *Schooner Peggy*, 1 Cranch (5 U.S.) at 110). In finding that national interests are implicated by awarding adequate interest to successful plaintiffs, the Court of Appeals below correctly recognized the role of private attorneys general in furthering public policy, by making a defendant

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[40] *See Bradley*, 416 U.S. at 719 (noting private attorney general concept in civil rights enforcement created public interest in attorney fee statute at issue) (quoting *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968)).

accountable for its intentional predatory destruction of a small competitor to preserve its monopoly.[41]

The Court of Appeals observed that "the congressional mandate that plaintiffs who prevail in [antitrust actions] be awarded treble damages should not be diminished by insufficient postjudgment interest." Kaiser Pet. A-22, 865 F.2d at 575. *Cf. Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law.").

Kaiser, if it were to prevail on its contentions, will have lost every battle in this litigation, but despite condemnation of its conduct by two juries and the courts, it will have won its war to preserve and strengthen its monopoly by predatory destruction of Plaintiffs' business and circumvention of payment for the bulk of its liability.[42] As the Court below correctly found, public policy and the nature and identity of the parties is a factor that "*weighs heavily* against finding manifest injustice" in the application of current law. Kaiser Pet. A-22, 865 F.2d at 575 (emphasis added).

(b) Nature Of The Rights: Application Of Current Law Would Not Deprive Kaiser Of Any Vested Or Matured Or Unconditional Property Rights

Kaiser complains, in its Opening Brief at 24 n.5, that: "The Court of Appeals did not identify or address Kaiser's rights at all." It cannot expect the court to identify or address

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[41] Kaiser Pet. A-21, 865 F.2d at 575 (citing *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-35 (1985)).

[42] According to Kaiser's position, Plaintiffs would not even receive an amount equivalent to single damages – failure to award adequate *postjudgment* interest would result in a diminution of ⅔ of the value of Plaintiffs' judgment (Plaintiffs' Opening Brief at 45) and *that judgment is already severely diminished by the failure to account for any prejudgment interest for the period from 1973 to 1979.*

vested rights where none exist – particularly where Kaiser has not articulated or even claimed any vested property rights.

Kaiser seeks to ignore the second manifest injustice factor, which focuses on whether application of a new law would deprive or infringe upon *vested* or unconditional or matured rights, 416 U.S. at 720. In the present case, as stressed above, the Court of Appeals correctly noted that there is no vested or unconditional right to any given rate of interest on a damage award that is not itself final.[43] Kaiser Pet. A-22, 865 F.2d at 575.[44]

Kaiser's Heavy Reliance On Litton *Is Misplaced*

Kaiser makes the bold and unsupported assertion that *Litton Systems, Inc. v. AT&T, Inc.*, 746 F.2d 168 (2d Cir. 1984), is "virtually identical to this [case]." Kaiser Brief at 23. Contrary to Kaiser's unsupportable assertion, *Litton* involved a significant award of $276 million, to which the parties *had stipulated* the applicable state interest rate of 9% – thus justifying the defendant's reliance that its interest liability was fixed. 746 F.2d at 170.

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[43] *Cf. Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.) (defendant had no right to rely on 8% legal interest rate as of 1975) *cert. denied*, 109 S. Ct. 273 (1988); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984) (defendant had no right to rely on prior 6% rate under Delaware law, but rather the current law rate of 16% was applicable over entire period), *cert. denied*, 475 U.S. 819 (1985).

[44] This conclusion follows from well settled law that there is no vested right to receive any particular rate of postjudgment interest *even after* a final controlling judgment is entered. *See Morley v. Lake Shore & M.S. Ry Co.*, 146 U.S. 162 (1892), and other decisions of this Court discussed above at p. 17 n.18.

In sharp contrast,[45] Kaiser had no justification to rely on its interest being limited to the inordinately low Pennsylvania 6% simple interest rate, which Kaiser knew might no longer be applicable as a matter of federal law and which Kaiser knew might be changed at any time as a matter of state law.[46] *Cf. Campbell v. United States*, 809 F.2d 563, 576 & n.9 (9th Cir. 1987) (distinguishing *Litton* on basis of stipulation).

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45 The manifest injustice found by the court in *Litton* arose in the context of the evidence presented by AT&T, none of which has any bearing on the present case:

1. The parties in *Litton* stipulated to a 9% rate, compared to Plaintiffs' protests in the present case that a 6% simple state law rate was inadequate.
2. The interest at issue in *Litton* represented only *15% of the judgment amount* in contrast to the present case which involves over 10 years of interest and *severe diminution* of the judgment, with interest measured at market rates as *almost 200% of the judgment amount*.
3. The District Court in *Litton Sys., Inc. v. AT&T, Inc.*, 91 F.R.D. 574, 575 (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984), had denied attorneys fees and costs due to misconduct in discovery and defendants argued that $40 million interest sought would improperly be used to compensate for denial of $10 million fees. *Litton Sys., Inc. v. AT&T, Inc.*, No. 76 Civ. 2512 (WCC), Defendants' [Brief in] Opposition to Plaintiffs' Motion to Amend the Judgment at pp. 3, 13 (S.D.N.Y. filed June 3, 1983).
4. *Litton* involved an attempted monopolization claim based on a tariff filed with the F.C.C. which was at least arguably protected by the *Noerr-Pennington* doctrine (*see Litton Sys., Inc. v. AT&T, Inc.*, 700 F.2d 785, 806-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984)). The present case involves vicious intentional predatory conduct where the sufficiency of the evidence to support liability was established by the Court of Appeals even before the 1979 liability verdict (579 F.2d at 31).

46 *Cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985).

Kaiser now postulates wrongly that:

> The evolving body of case law, both in the Third Circuit and elsewhere, supported Kaiser's *right to assume* that interest ran at Pennsylvania's 6% simple interest rate.

Kaiser Brief at 21 (emphasis added). Kaiser grossly mischaracterizes the "evolving body of case law, both in the Third Circuit and elsewhere."[47] Moreover, Kaiser has not suggested any way in which caselaw on other disputes may have given Kaiser a *vested right* to limit its obligation to pay interest at Pennsylvania's 6% simple interest rate in this litigation, which had not proceeded to final controlling judgment on the merits. See pp. 14-20 & nn.15-20 above.

Indeed, although Kaiser claims some amorphous, unvested "right to rely" or "right to assume"[48] Kaiser has

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47 See p. 31 n.35 above. As the court below noted, it had cited the Eighth Circuit's *Dalton* holding with approval in an earlier opinion. Kaiser Pet. A-20, 865 F.2d at 574. Moreover, Third Circuit caselaw generally favors market rate interest awards. See Plaintiffs' Opening Brief at 39 & n.60. See also p. 37 & nn.43-44 above (no right to rely).

48 Contrary to the gross mischaracterization in Kaiser's Brief at 21, Plaintiffs *specifically put Kaiser on notice that they would seek an adequate rate of interest*, but Kaiser never tendered any money to Plaintiffs or into court to stop or reduce the running of interest. *See, e.g.*, R. 601 (quoting Plaintiffs' April 1, 1985 Motion for Posting of Security which sought increase in bond for interest "*without prejudice to Plaintiffs' right to seek interest * * * at a higher rate.*") (emphasis added).

Kaiser never made any arguments to either of the courts below based on "estoppel," and naturally, as the District Court found, *sua sponte*, (Kaiser Pet. A-46) there is and could be no *estoppel* in Plaintiffs' counsels' statements on *potential* ultimate resolution of a *legal* issue, particularly where the Court before which any such statements were made did not take the action sought by Plaintiffs and Plaintiffs' *expressly reserved the right to seek interest at an adequate rate. Cf. United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986) (no cognizable estoppel); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (no unequivocal statement; position not successfully asserted);

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never presented any evidence of any *detrimental reliance* or claimed any *vested rights*. The unrefuted evidence of record establishes that *the only result* of Kaiser's delay of payment on the judgment since 1979, and refusal to tender any payment of its liability until July 3, 1986 and continued refusal to tender any interest whatsoever – *is Kaiser's gain, at Plaintiffs' expense*, at commercial market rates, *of $18.6 million*. Plaintiffs seek only to disgorge that gain, not to impose any further obligations on Kaiser.

(c) *Nature Of The Impact Of The Change In Law Upon Existing Rights:* Application of Current Law On Interest To A Pending Case Has No Impact On Existing Rights And Does Not Alter The Substantive Law Prohibiting Kaiser's Predatory Conduct

Concepts of manifest injustice are focused on the impact of change in law on *vested rights;* – and not, as Kaiser contends, on desired results postulated by parties to litigation. Kaiser had no reason or right to believe that, with interest rates approaching 18-20% by 1980 (*see* Reitz, J.A. 220), it could ignore the power of courts to award adequate interest or bank on the fact that Pennsylvania law would not be changed – or that Congress might not make the amendments it ultimately did.

The third factor in the analysis for manifest injustice considers the *impact of the change in law upon the rights of the parties*. The inquiry here is whether the change imposes new and unanticipated obligations that would have caused the

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Gleason v. United States, 458 F.2d 171 (3d Cir. 1972) (position not successfully asserted); *United States v. Mills*, 372 F.2d 693, 696-97 (10th Cir. 1966) (no adjudication of issue); *Lawrence v. ICC*, 629 F. Supp. 819, 822 (E.D. Pa. 1985) (no irreconcilable contradictory positions).

party to change the conduct that led to the lawsuit. *Bradley*, 416 U.S. at 720.

In *Bradley*, this Court noted that clarification of the right to a fee award had no bearing on the underlying violation of civil rights by defendants. 416 U.S. at 720-21 ("there was no change in the substantive obligations of the parties"). Similarly, refinements in the interest rate on judgments have no bearing on Kaiser's *substantive* liability under the antitrust laws. As early as 1972, Kaiser began a course of conduct to intentionally violate the antitrust laws in its ultimately successful effort to destroy a small competitor. Kaiser was bound to know that such conduct would give rise to a claim for damages and an obligation to pay interest sufficient to preserve the value of an adverse judgment.[49]

Moreover, this Court in *Bradley* found that the statutory provision for attorneys fees "merely serves to create an additional basis or source for the Board's potential obligation to pay attorneys' fees." In language particularly appropriate for the instant case, this Court then stated: "It [the statutory basis] does not impose an additional or unforeseeable obligation on [the Board]." 416 U.S. at 721.

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[49] As an adjudicated violator of the antitrust laws, Kaiser bears all the risks of uncertainty caused by its illegal conduct. *See Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265 (1946). One of those risks was the uncertainty about the rate of interest over the long periods of delay caused by Kaiser's post-trial motions. Kaiser alone was in a position to alleviate this uncertainty by paying the judgment or tendering the amount of its anticipated liability and accrued interest into court under Fed. R. Civ. P. 67. *Cf. Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1023 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985); *Campbell*, 809 F.2d at 574.

Because of stays obtained by Kaiser, Plaintiffs could take no action to enforce the judgment and were relegated to the sole remedy of seeking an adequate award of interest following the conclusion of the litigation on the merits. Kaiser took the risk that it might or might not get away with its gross unjust enrichment. It cannot now complain because Congress and the courts determined that it should pay a more adequate rate of interest on the judgment.

As set forth in Plaintiffs' Opening Brief at 31-46, independent of any amendment to 28 U.S.C. §1961, there is strong and longstanding precedent for Kaiser's obligation to pay a fully compensatory rate of interest for delay in payment of Plaintiffs' judgment. Accordingly, the statutory basis for a more adequate rate of interest does not impose any additional or unforeseeable obligations on Kaiser.

D. PUBLIC POLICY: Kaiser Ignores All Of The Important Policy Concerns And Purposes Of Interest Awards That Compel Finding Against Kaiser's Contentions

1. Interest Awards Should Recognize Economic Reality And Preserve The Value Of Judgments

Kaiser requests that this Court totally disregard economic reality and the litigants' cost of money in the private marketplace. In changing 28 U.S.C. §1961, Congress attempted to bring some concepts of economic reality into the determinations of interest to be awarded as a routine matter on federal District Court judgments. The repealed statute Kaiser seeks to apply fails to preserve the value of the judgment and encourages litigants to string out litigation to profit from submarket rates of interest.

2. Interest Awards Are Intended To Prevent The Unjust Enrichment Kaiser Seeks At Plaintiffs' Expense

This Court should not adopt a ruling on interest sought by Kaiser that would allow inequitable profits secured by wrongdoers during long periods of delay at the expense of their victims. The Court should not allow federal equity courts to be used as vehicles for unjust enrichment.

3. Kaiser Improperly Seeks To Use Court Delay To Circumvent The Antitrust Laws

Furthermore, this Court should not permit Kaiser to enjoy monopoly profits from its destruction of Plaintiffs' business more than ten years ago, and at the same time to avoid payment of its full liability under the antitrust laws, which was established in 1979. Long-term business and litigation strategies to string out litigation and profit from delay should not be condoned, particularly in an antitrust case where the wrongdoer continues to enjoy the monopolistic fruits of its intentional, anticompetitive and predatory actions.

4. Kaiser Ignores The Implications That Denial Of Adequate Interest Will Have In Encouraging Dilatory Litigation

Finally, in repealing the old version of §1961, Congress sought to eliminate incentives for dilatory relitigation of issues in the courts. This Court should send a clear signal to litigants that, while they are entitled to challenge the verdicts of juries and the judgments of the courts through post-trial motions and appeals, if they do so, and lose, they should expect to pay at least a fully compensatory rate of interest over periods of delay in execution on the judgment during which they had the use and enjoyment of someone else's money.

III. KAISER'S CONTENTION THAT ONLY ONE OR TWO DAYS OF INTEREST SHOULD BE AWARDED IS OUTRAGEOUS AND WAS PROPERLY REJECTED BY THE COURT BELOW

Kaiser contends that interest should be calculated beginning on July 2, 1986, and run for only one day until payment of a sum of $9,567,939 with no interest on July 3, 1986.

For ten years, since its liability was established in August 1979, Kaiser has continued to enjoy the benefits of the use of Plaintiffs' money. See Plaintiffs' Opening Brief at 5-8. Plaintiffs respectfully refer the Court to their Opening Brief at

17-30, where Plaintiffs demonstrate that interest should run from the date of the original judgment in their favor: August 22, 1979.

Kaiser's Brief does not state any basis on which to stray from the well-accepted rule that interest should run from the date of the original judgment in favor of Plaintiffs.

A. Failure To Award Interest Adequate To Preserve The Value Of The Judgment Would Allow Unjust Enrichment And Unduly Encourage Post-Trial Litigation And Delay

Kaiser by its one-day-of-interest contention, seeks a result that has no justification in law or any of the equitable or public policy purposes of interest awards discussed above at pp. 42-43. See also Plaintiffs' Opening Brief at 13-30. Kaiser fails to acknowledge that interest on the judgment measures the time value of money for detention of the judgment debt.

The courts must not allow predatory monopolists such as Kaiser to abuse their monopoly power to drive small competitors such as Plaintiffs out of business – and then use long periods of court delay to offset their exposure by accumulating monopoly profits and severely diminishing the value of their liability over the passage of time.

B. Neither Of The Two Lower Court Cases Cited By Kaiser Supports Denial Of Interest Over The Period Of Court Delay

In suggesting that only one day of interest should be awarded over the ten years of delay, Kaiser acknowledges the merit of the equitable arguments in Plaintiffs' Opening Brief, but fails to address the equities of this case. Kaiser cites two Court of Appeals' decisions in support of its hollow equity arguments. Those cases were decided on facts inapplicable to the present case. *Affiliated Capital Corp. v. City of Houston*,

793 F.2d 706 (5th Cir. 1986); *Brown & Williamson Tobacco Corp. v. Jacobson*, Nos. 86-2474, 86-2475, 1987 U.S. App. LEXIS 15194 (7th Cir. Nov. 6, 1987).

In *Affiliated Capital*, the District Court had entered judgment NOV for all defendants and the issue of liability was in substantial doubt. A sharply divided Court of Appeals, although having reinstated the jury's award, denied interest back to when liability was first decided. As Judge Patrick Higginbotham noted, separately concurring in the result:

> In my view, this defendant was defeated on the merits because it passed through a *time window of changing law*, rather than because it engaged in conduct that was malevolent by antitrust standards.

793 F.2d at 713 (emphasis added). By contrast, in the present case, the sufficiency of Plaintiffs' evidence was established by the Court of Appeals in 1978,[50] and the jury's verdict of liability for intentional predatory conduct in 1979 has never been disturbed by any court.

As Judge Brown noted in his dissent in *Affiliated Capital* denial of full interest would be an "inequitable use of equity":

> The "equity" done by the majority penalizes the victorious plaintiff for the District Court's error, and gives the defendant a windfall. [An award of interest from the date of the original judgment] puts both parties in the position in which they would already be but for the District Court's error.
>
> The Court, under the guise of "equity" denies interest essentially because the case was close. Considering the functions of interest, it hardly seems significant, in equity or otherwise, that the case was close, involved difficult issues, or engendered a vigorous dissent. Moreover, I think it is unwise and shortsighted to set a precedent establishing different

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[50] *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). *See also* p. 47 & n.52 below.

> qualitative levels of victory. A win, whether by four touchdowns or a last second field goal, is a win.

793 F.2d at 713-14, *see also id.* at 714 (dissent of Rubin, Brown, Johnson & Williams, JJ.).

Moreover, Kaiser ignores the severe diminution suffered by Plaintiffs in the value of their judgment by failure to account for any prejudgment interest over the period from 1973 to 1979. Denial of those six years of interest on top of the denial of ten years of interest from 1979 suggested by Kaiser, would not even permit Plaintiffs to receive the single damages proved, – let alone the ample recovery of treble damages to which they were entitled as of 1979. That ample recovery is mandated by Congress both for deterrence and to account for all of the damages to Plaintiffs that are not susceptible to simple measurement in dollar terms – such as Plaintiffs' endurance of more than 15 years of bitter litigation against a huge monopolist, during the prime years of their lives when they should have been engaged in the profitable and productive enterprise that Kaiser destroyed.[51]

Similarly, the *Brown & Williamson* case does not support Kaiser's position that only one day of interest should be awarded in the present case. In *Brown & Williamson*, the court, in a libel case, had to determine whether to grant, under its Rule 37 authority, any back, postjudgment interest, where the lower court had set aside a jury's $3 million compensatory award, and had awarded nominal damages of only one dollar. On a very different theory, the Court of Appeals had held that plaintiff should recover $1 million compensatory damages. The Seventh Circuit held that interest on its $1 million award would run only from the date of its decision fixing the amount of compensatory damages.

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[51] *See Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 & n.36 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1566 (1966); Vold, *Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L.J. 117 (1939); *see also* Plaintiffs' Opening Brief at 16 & n.20-21.

The Seventh Circuit itself determined the amount of the compensatory damage award, taking into account the "probable extent of actual loss [the plaintiff] had suffered and would suffer in the future." *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1138 (7th Cir. 1987). Thus, its decision under Fed. R. App. P. 37 is consistent with decisions allowing interest dating back to the original judgment, *only if* a subsequent recalculation of damages does *not* account for the time value of money over periods of delay. *See* Plaintiffs' Opening Brief at 17-30.

Moreover, Kaiser ignores and overlooks the fact that in *Brown & Williamson*,

> The parties [did] not dispute that the postjudgment interest on the $2,050,000 *punitive damages* should run from the *date of the original judgment*.

1987 U.S. App. LEXIS 15194 at *2 n.1 (emphasis added). That agreement of the parties, conclusively refutes Kaiser's argument on the "equities" with respect to treble damages.

Finally, Kaiser's Brief at 43 makes the extraordinary contention that Plaintiffs' "victory was far from 'clear cut.' " Aside from the record which demonstrates that Kaiser's statement is patently untrue,[52] a dispute over the appropriate

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[52] *Plaintiffs' judgment was repeatedly, unequivocally and conclusively affirmed* by two unanimous juries (1979 & 1981), by two District Court Opinions (1981 & 1983), two unanimous decisions of separate panels of the Court of Appeals (1978 & 1984), and two denials of certiorari by this Court (1978 & 1986), and by the Justice Department.

In improperly attempting to relitigate the merits, Kaiser makes vague reference in its brief (Kaiser Brief at 43) to the Justice Department's criticism of the Third Circuit's analysis of the "price squeeze" issue. *Kaiser omits the conclusion of the Justice Department that Kaiser's second petition for writ of certiorari should be denied* because Kaiser's liability for intentional destruction of Plaintiffs' business was established by sufficient evidence *independent* of the price squeeze:

> Columbia has presented only a single theory of liability – that Kaiser violated Section 2 by seeking to drive Columbia out of

(Continued on following page)

amount of interest on a judgment is not a proper forum to relitigate the merits. Kaiser must accept the facts and the law as determined by the juries and the courts.

C. Kaiser Cannot Challenge The Power Of The Court Below To Award Interest Back To The Date Of A Verdict

Kaiser argues to this Court, for the first time, and contrary to its position below, that §1961 precludes determination of postjudgment interest from December 2, 1981, contending that this was the verdict date, not the judgment date, which did not occur until two days later. Kaiser Brief at 41. As pointed out in Plaintiffs' Brief Opposing Kaiser's Certiorari Petition at 12-13, Kaiser is foreclosed from raising this new argument contrary to its position below.

Kaiser's only motivation for this change in position concerning the two days of interest involved is an attempt to take advantage of a lower T-bill rate that "settled" December 3, 1981. See Plaintiffs' Opening Brief at 44 n.72. Thus, if Kaiser were to prevail on its contention that Plaintiffs can only recover interest from the 1981 re-calculation of damages; – and if Plaintiffs were to be limited to only Treasury Bill rates, under the federal interest statute for routine District Court judgments, then there could be a swing of $4 million in the award of interest (between $8 million and $12 million), depending on whether interest runs from the date of the verdict (December 2, 1981), or from the date when judgment

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(Continued from previous page)

> business – supported by a variety of evidence, including the evidence relating to the price squeeze. A determination that the price squeeze evidence cannot support Columbia's theory of liability does not render *the other evidence* insufficient to support the jury's verdict.

Brief for the United States as Amicus Curiae at 21, No. 84-1907 (U.S.) (emphasis added).

was entered by the district court on the verdict (December 4, 1981).

This extraordinary swing occurs because, under 28 U.S.C. § 1961 as amended, interest rates are fixed, as a matter of administrative convenience, on a day certain and are held constant whether market rates go up or down.

In a belated attempt to deny Plaintiffs $4 million of the gain Kaiser obtained from the use of Plaintiffs' money, Kaiser now disingenuously contends that the Courts of Appeals have no power to award interest from the date of a "verdict" rather than a "judgment." Kaiser's contention is squarely contrary to principles of equity, inherent power of the courts, Fed R. App. P. 37, the purposes behind §1961 and the weight of authority in the lower courts.[53] Fed. R. Civ. P. 58 requires entry of judgment forthwith, as was requested by Plaintiffs counsel on December 2, 1981 (J.A. 143). Kaiser's belated contention that both courts below should have awarded interest from December 4 instead of December 2 should be rejected.

CONCLUSION

For the reasons stated in Plaintiffs Opening Brief in No. 88-1771 and in this Brief, Plaintiffs ask this Court to reaffirm the inherent and equitable power of the Courts of Appeals and their authority under Fed. R. App. P. 37 to award adequate interest to carry out the purposes of interest awards.

Plaintiffs request the Court to remand to the Court of Appeals with instructions to award interest on $9,567,939 at monthly average prime rates (as reported by the Federal Reserve Bank), compounded monthly, from August 22, 1979 to the date of full payment of all principal and interest.

Only if this Court rejects Plaintiffs' position that they should receive full market rate interest, then in the alternative, Plaintiffs ask that the Court remand with instructions

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[53] See cases cited in Plaintiffs' Opening Brief at 21 n.31; Reitz, J.A. 235-262.

that interest be calculated under 28 U.S.C. §1961 as amended from August 22, 1979 at the T-bill rate of 10.05%, compounded annually pursuant to §1961(b).

To the extent the Court of Appeals held that interest should not be calculated at 6% simple interest, and that interest should begin to run as of a date earlier than July 1, 1986, it should be affirmed.

Respectfully submitted,

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APPENDIX

OF

RULES AND STATUTES

1. Fed. R. App. P. 37 provides:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified, or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

2. 28 U.S.C. §1961, as amended effective October 1, 1982, provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a District Court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1)This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

3. Fed. R. Civ. P. 67 provides:

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C. §§2041, and 2042; the Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, §725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

Supreme Court, U.S.
FILED
OCT 2 1989
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CLERK

No. 88-1595

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR
(Executrix of the Will of GEORGE M. KERR, JR.),
and BARBARA K. CLISBY,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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ARGUMENT

Plaintiffs have not refuted Kaiser's showing that the decision of the Court of Appeals, applying amended §1961 retroactively to a judgment entered prior to its effective date, was wrong and should be reversed.

The Court of Appeals relied on the incorrect presumption that current law applies retroactively rather than adhering to the traditional rule disfavoring retroactive lawmaking. The Court of Appeals also failed to recognize that this case fits within all three of the exceptions to *Bradley v. Richmond School Board,* 416 U.S. 696 (1974). Finally, the Court of Appeals measured postjudgment interest from the date of a *verdict,* in contravention of the plain language of the federal postjudgment interest statute which requires that interest accrue from the "date of entry of the *judgment.*" 28 U.S.C. §1961.[1]

A. The Outcome Of This Case Does Not Turn On The Identification Of "Vested Property Rights".

Plaintiffs wrongly argue that because application of amended §1961 in this case does not impair or destroy "vested property rights," it is not retroactive. On the contrary, the concept of retroactivity is much broader than plaintiffs suggest and does not require that "vested rights" be impaired. In fact, neither the concept of "vested rights," nor the question of when rights "vest" is relevant in this case, where Kaiser simply asks the Court to construe a statute and has not raised a constitutional challenge to application of the statute.

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1. Emphasis supplied throughout, unless otherwise indicated.

1. Application Of Amended §1961 To A Judgment Entered Prior To Its Effective Date Gives The Statute Retroactive Effect.

Application of the 1982 amendment to §1961 to the 1981 judgment[2] entered in this case is a retroactive application of the statute, regardless of whether Kaiser's rights were "vested" or "unvested" on the effective date of the statute. By raising the concept of "vested rights" and making it the constant refrain throughout their brief[3], plaintiffs are attempting to restrict the definition of a retroactive law far beyond its common and accepted meaning.

Justice Story, in a frequently-cited definition of retroactive laws, explained that "every statute, which takes away or impairs vested rights acquired under existing law, *or* creates a new obligation, imposes a new duty, *or* attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective . . ." *Society for the Propagation of the Gospel v. Wheeler,* 22 Fed. Cas. 756, 2 Gall. C.C. 105, 139 (C.C.N.H. 1814). *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle Of Jurisprudence,* 20 Minn. L. Rev. 775, 782 (1936). One commentator explained that "[a] retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Hochman, *The Supreme Court And The Constitutionality Of Retroactive Legislation,* 73 Harv. L. Rev. 692, 692 (1960). Another commentator found three meanings to the term "retroactive law":

2. Plaintiffs continually misstate that this case involves an August 1979 judgment. The 1979 judgment was *not* for $9,567,939 and was vacated and never reinstated.

3. The words "vest," "vested," or "vesting" appear *53 times* in plaintiffs' 50-page brief.

> One is that a law is retroactive if it extinguishes or impairs legal rights already acquired by the individual under the laws previously existing. . . . Another meaning is that a law is retroactive if it assumes to give effect to a past event, in order to create a present right or duty. And a third is that a law is retroactive when it assumes to give to a past event the effect of creating rights and duties *ab initio,* or as of some time prior to the retroactive law.

Comment, *Retroactive Laws And Vested Rights,* 5 Tex. L. Rev. 231, 232 (1927).

According to any one of these formulations, the holding of the Court below – that Kaiser's obligation to pay postjudgment interest on a judgment entered in *1981* was governed by a statute passed in *1982* – constituted a retroactive application of that statute.

2. "Vestedness" Is Only Relevant In The Context Of A Constitutional Challenge To A Retroactive Law.

When a party challenges the *constitutionality* of a retroactive statute,[4] the court examines the effect retroactive application will have on the parties, their rights, duties and obligations, including, in some instances, whether the rights they claim are "vested". *See* Hochman, *supra,* at 696 ("The traditional principle invoked in determining the constitutionality of retrospective legislation is that a statute may not abrogate 'vested rights' "); Sand, *Sutherland Statutory Construction* §41.06 (4th ed. 1986). Depending on the outcome of that evaluation, the court may find that the statute is unconstitutional under the Due Process Clause or one of

4. This might occur either when the law was expressly retroactive, or where the court has construed it and found that the legislature intended that it be applied retroactively. *See, e.g., United States v. Security Indust. Bank,* 459 U.S. 70 (1982) (illustrating this two-prong approach and avoiding constitutional prong by construing the statute prospectively).

the specific constitutional provisions designed to eliminate unfairness of this kind. *See* U.S. Const. art. 1, §9, cl. 3; *id.* §10, cl. 1 (*ex post facto* laws, bills of attainder, impairment of contracts).

This Court in *Weaver v. Graham,* 450 U.S. 24 (1981), explained that the "vestedness" concept applies only in the context of a constitutional challenge to a statute brought under the Due Process or Contracts Clauses. The Court in *Weaver* addressed a claim by a Florida prisoner that a state statute violated the prohibitions against *ex post facto* laws in the United States and Florida Constitutions. The state statute in place on both the date of the offense and the date of sentencing provided a formula for deducting gain-time credits from the sentences of certain prisoners. In 1978, two years after the petitioner's sentencing, Florida enacted a statute changing the formula for computing monthly gain-time deductions. Florida applied the new statute "not only to prisoners sentenced for crimes committed since its enactment in 1978, but also to all other prisoners, including petitioner, whose offenses took place before that date." *Id.* at 27. The prisoner sought a writ of *habeas corpus* from the Supreme Court of Florida, which was denied. The state court "reasoned that 'gain time allowance is an act of grace rather than *a vested right* and may be withdrawn, modified, or denied.'" *Id.* at 28 (citing *Harris v. Wainwright,* 376 So.2d 855, 856 (1979)).

This Court reversed. In an Opinion authored by Justice Marshall, the Court explained that there are two "critical elements" of an invalid *ex post facto* law:

> . . . it must be *retrospective,* that is, *it must apply to events occurring before its enactment,* and it must disadvantage the offender affected by it.

Id. at 29. The Court *rejected* the Supreme Court of Florida's requirement that the law impair vested rights. Justice Marshall explained the limited significance of

vested rights even in the constitutional setting:

> *Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements.*

Id. at 29-30.

Every case cited by plaintiffs as support for their position that Kaiser must identify a "vested right" deals with the *constitutionality* of a retroactive change of law. *See Funkhouser v. J.B. Preston Co.,* 290 U.S. 163, 167-68 (1933); *Morley v. Lake Shore & M.S. Ry. Co.,* 146 U.S. 162, 168-69 (1892); *Missouri & Ark. Lumber & Mining Co. v. Greenwood Dist. of Sebastian County,* 249 U.S. 170, 172-73 (1919). These cases are not relevant here. The Supreme Court did not evaluate whether the statutes at issue were properly applied. In *Funkhouser,* the statute was *expressly retroactive.* 290 U.S. at 164 n.1. In both *Morley* and *Missouri & Ark. Lumber,* the Supreme Court accepted the retroactive construction of state statutes by the highest courts of New York and Arkansas.

In this case, where Kaiser has asked the Court to construe this federal postjudgment interest statute, and where Kaiser has not raised a constitutional challenge to amended §1961, the presence or absence of "vested rights" is absolutely irrelevant.[5] According to this

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5. Even if Kaiser had mounted a constitutional attack on the retroactive application of amended §1961, plaintiffs' reliance on the concept of "vested rights" would be misplaced. As one commentator observed, "it has long been recognized that the term 'vested right' is conclusory — a right is vested when it has been so far perfected that it cannot be taken away by statute. More discerning commentators and judges have suggested that *the true test of the constitutionality of a retrospective law is whether a party has changed his position in reliance upon the existing law, or whether the retrospective act gives effect to or defeats the reasonable expectations of the parties.*" Hochman, *supra* at 696. It is clear that Kaiser reasonably relied on interest running at the state law rate in making

Court's reasoning in *Weaver*, retroactivity requires only that a law "apply to events occurring before its enactment. . . ." 450 U.S. at 29.

3. Plaintiffs' "Vesting" Analysis Was Properly Rejected By The District Court As "Specious".

Before the district court, plaintiffs also denied that retroactivity was involved, stating that the "*issue is not one of retroactive application of the statute*." Appendix in Court of Appeals, Nos. 88-1318, 88-1396 at 589a. Rather, plaintiffs advanced what they termed the "vesting analysis". They claimed that "the issue is one of current interpretation and application of a statute that contemplates a retrospective award of interest going forward from an earlier date." *Id*. Plaintiffs hired Professor Curtis Reitz, a law professor at the University of Pennsylvania, to write a paper explaining the "vesting analysis".

According to this theory, the version of §1961 to be applied is not tied *either* to current law *or* to the law in effect at the date of the judgment chosen to begin the accrual of interest. Instead, the "vesting analysis" looks to an interim date *after* the effective date of amended §1961 for the purpose of establishing what law governs the rate of interest. Plaintiffs refer to this as the "vesting date". Plaintiffs arbitrarily chose December 27, 1984, the date of the Court of Appeals' judgment reversing the district court's judgment n.o.v. and reinstating the December 4, 1981 judgment as their "vesting date." They then calculate the rate using the T-bill rate from August 16, 1979 and apply it to a judgment which did not exist until December 4, 1981. Without any authority, plaintiffs and Professor Reitz have simply concocted a theory

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NOTES *(Continued)*
postjudgment decisions, and the application of amended §1961 defeats Kaiser's reasonable expectations.

which awards them the most interest, at the highest rate, over the longest period of time.

The district court correctly labelled the "vesting analysis" of Professor Reitz "specious". (P.A.45). Perhaps as a result of this, plaintiffs significantly deemphasized the "vesting analysis" before the Court of Appeals and the Opinion of the Court of Appeals does not address it. This Court should reject plaintiffs' attempt to revive the "vesting analysis." It is illogical, convoluted, and not supported by *any* authority. The district court properly found it "inconsisten[t] with case law and the equities of this case" and "not yet adopted by any court. . . ." (P.A.38).

B. This Court's Reasoning In *Bowen v. Georgetown University Hospital* Applies Directly To This Case.

In *Bowen v. Georgetown University Hospital,* 109 S.Ct. 468, 471 (1988), this Court unequivocally and without exception declared that:

> **. . . congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.**

In arguing that a contrary presumption should apply to the construction of amended §1961, plaintiffs vainly attempt to distinguish *Bowen*. They cannot do so, as the petitioner in *Bowen* raised the same arguments as plaintiffs are raising here. This Court rejected those arguments in *Bowen* and should also reject them in this case.

Like plaintiffs here, the petitioner in *Bowen* argued that the hospitals had no *"vested"* rights and, therefore, retroactive application of a statute was warranted. He argued that "the fact that the agency committed a procedural error in its prior endeavor does not confer on anyone a *'vested right'* in any particular regulatory

outcome on remand." Brief For Petitioner in No. 87-1097, at 16. Also like plaintiffs here, the *Bowen* petitioner argued that because the law he sought to apply retroactively was *remedial* or *curative,* retroactive application was justified. He stated that "courts have long upheld similar exercises in 'curative' lawmaking because they do *not* raise any of the problems of inadequate notice generally associated with retroactive rules." *Id.* at 18 (emphasis in original). As plaintiffs do here, he argued that curative acts impair " 'no substantial right or equity. . . .' " *Id. Compare* Pl. Red Brief, at 10-11 ("remedial changes in law should be applied to pending cases . . .").

Furthermore, just as plaintiffs argue here, the petitioner in *Bowen* argued that the hospital's right to reimbursement was not "mature and unconditional" before the new law. The petitioner explained that, although reimbursements had been made prior to the new law, all reimbursements "were expressly made subject to reopening and recoupment in the event of an adjustment in the amount of reimbursement as the result of the adoption of a new wage cost regulation." Reply Brief For Petitioner in No. 87-1097, at 16.[6]

6. In their attempt to distinguish *Bowen,* plaintiffs assert that the hospital's right to reimbursements in *Bowen* "matured and became unconditional" prior to the new law by reason of the district court decision invalidating the 1981 rule. They assert that this decision settled the issue of the amount of the reimbursement. (Pl. Red Brief at 23 n.25). The petitioner in *Bowen,* however, specifically addressed this argument, arguing that the hospital's rights were in no way fixed by the district court's decision:

> . . . that decision did not order the Secretary to pay respondents in accordance with the Secretary's prior 1979 rule; nor did it deny the Secretary any right subsequently to promulgate a retroactive rule on remand. As its terms make clear (*see* Pet. App. 64a), the 1983 order simply invalidated the 1981 rule. It did not finally decide the question of the appropriate standard to be applied in calculating the wage cost reimbursement owed to respondents under the Medicare program. Indeed, the district court specifically refused to issue an order barring the Secretary from applying the 1981 rule to respondents' reimbursement claims, holding that the provisions of the Medicare statute requiring exhaustion of administrative remedies deprived the court of any authority to issue such an order. Hence, the Secretary's decision not to appeal that order did not reinstate the Secretary's prior 1979 rule so as to preclude any subsequent retroactive rulemaking.

Reply Brief For Petitioner in No. 87-1097, at 5.

Bowen is not distinguishable. The Court there rejected the identical arguments plaintiffs are making here. The only difference is that the law in *Bowen* was *explicitly* retroactive and, therefore, the Court did not need to resort to a presumption. Where plaintiffs ask the Court to *imply* retroactivity, the case for prospective-only construction is even stronger as it does not require the Court to invalidate express legislative action.

As in *Bowen,* the Court should adhere to the presumption *against* retroactive laws, confine the application of amended §1961 to the calculation of postjudgment interest on judgments entered after its effective date, and reverse the decision of the court below.

C. This Case Involves Calculation Of Interest On A District Court Judgment.

Although they did not raise it below, before this Court plaintiffs argue that they are seeking postjudgment interest on the December 27, 1984 judgment of the Court of Appeals, rather than on a judgment of the district court. This argument is wholly unmeritorious.

First, it is undisputed that plaintiffs seek interest on a sum of money in the amount of $9,567,939, which Kaiser paid to them on July 3, 1986. Second, it is undisputed that the judgment for $9,567,939 was entered and recovered *in the district court.* Finally, it is undisputed that the December 27, 1984 judgment of the Court of Appeals was *not a money judgment,* as it simply

ordered the district court to reinstate a judgment. Obviously, postjudgment interest may only run on a judgment for a sum of money. The interest plaintiffs seek is interest on the $9,567,939 judgment of the district court, not interest on the judgment of the Court of Appeals.

Despite the seeming obviousness of this conclusion, plaintiffs now wrongly insist that the question in this case is "the issue of appropriate interest on the Court of Appeals' judgment of December 27, 1984." (Pl. Red Brief, at 5).[7]

D. The Court Of Appeals' *Bradley* Analysis Was Flawed.

In its opening brief, Kaiser argued that the traditional presumption *against* retroactive laws should apply here, rather than the approach taken in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974). Even if this Court decides to adhere to *Bradley,* however, the "*Bradley* presumption" that current law applies is displaced in any one of three situations: (1) where there is a fair indication from the legislative history of the law that Congress did not intend the law to apply retroactively; *or* (2) where the statutory terms indicate that Congress did not intend the statute to apply retroactively; *or* (3) where application of current law would result in manifest injustice. Kaiser had shown that the

7. Plaintiffs also incorrectly state that the district court and the Court of Appeals viewed the question as the appropriate interest on a Court of Appeals' judgment. This is wrong. The Court of Appeals expressly applied amended §1961 retroactively, and the district court applied the prior version of §1961, both of which apply to interest on money judgments entered *in the district court.* The Court of Appeals specifically rejected plaintiffs' argument that Rule 37 allowed it to depart from the terms of §1961 with respect to the appropriate interest rate. (P.A.14 n.11).

requirements of all three of these exceptions are satisfied here, and that the Court below erred when it came to the opposite conclusion. Plaintiffs have not refuted this showing.

1. The Statutory Terms And Legislative History Of Amended §1961 Show That It Was Not Intended To Govern Postjudgment Interest Calculations On Judgments Entered Prior To Its Effective Date.

Congress' intent that amended §1961 apply only prospectively to judgments entered after its effective date is shown by the fact that Congress chose to delay the effective date of the statute for six months after its enactment. Plaintiffs have offered no other convincing explanation for this delay.

Plaintiffs have not even attempted to refute Kaiser's showing that the legislative history supports a prospective-only construction of amended §1961. The legislative history indicates that Congress chose to implement the new statute only after a "transition period". S. Rep. No. 275, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 42. It shows that Congress had a countervailing interest in protecting the reliance interests of litigants who had made postjudgment and pre-amendment decisions based on the old rates. (P.A.27). Plaintiffs respond by repeating that the purpose of the new postjudgment interest statute was to bring postjudgment interest rates more in line with commercial interest rates. However, there is no inconsistency between the overall purpose of the amendment and an intent that it not apply retroactively to judgments entered prior to its effective date.

2. Application Of Amended §1961 Would Result In Manifest Injustice To Kaiser.

Under *Bradley,* a manifest injustice finding requires consideration of (1) the nature and identity of the

parties; (2) the nature of the rights affected; and (3) the nature of the effect of application of current law on those rights. Plaintiffs have not contradicted Kaiser's showing, pursuant to these three factors, that it will suffer manifest injustice if this Court permits the Court of Appeals' decision to stand.

a. This Case Is Between Private Parties.

In both *Bradley* and *Thorpe v. Housing Authority,* 393 U.S. 268 (1969), the Court applied current law retroactively, relying on the fact that the entities affected by the change in law were *public bodies.* The Court explicitly acknowledged, however, that in cases between *private parties,* courts should "struggle hard" *against* applying intervening changes in law when to do so would affect the rights of a litigant. 416 U.S. at 717 (citing *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801)). This case is indisputably a case between private parties and, accordingly, amended §1961 should not be construed to apply.

Plaintiffs attempt to obfuscate this critical distinction by highlighting their role as "private attorneys general" in bringing this private antitrust action. They claim that their "private attorneys general" role distinguishes this case from an ordinary case, and justifies a more favorable award of postjudgment interest.

Plaintiffs' reasoning fails. This Court rejected a similar position advanced by the petitioners in *Alyeska Pipeline Service Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975). The petitioners in *Alyeska* proposed that in all cases in which a party is acting in the role of a private attorney general, the Court create a wholesale exception to the American rule that litigants bear their own attorneys' fees. In rejecting this proposal, this Court reasoned that:

> *. . . congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule* against nonstatutory allowances to the prevailing party and to award attorneys' fees *whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award* . . . it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant . . .

Id. at 263-64. The Court concluded that courts may not "pick and choose among plaintiffs and the statutes under which they sue and . . . award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.* at 269.

This reasoning applies with equal force here. Plaintiffs' role as private-attorneys-general in the merits portion of this lawsuit entitled them to claim treble damages and attorneys' fees. Their attempt to obtain additional procedural advantages without any statutory authorization runs directly contrary to this Court's reasoning in *Alyeska.* The decision of the Court of Appeals accepting plaintiffs' position should be reversed.

b. Kaiser's Rights Should Be Protected: *Bradley* Does Not Require That Application Of Current Law Destroy "Vested Property Rights".

Contrary to plaintiffs' suggestion throughout their brief, this Court has never held that the *Bradley* manifest injustice exception protects only vested property rights. (Pl. Red Brief, at 11, 25-26, 28, 37 and 40). Indeed, this Court in *Bradley* did not even hold that the rights involved must be "mature and unconditional". In *Bradley,* this Court simply articulated three components of the manifest injustice exception, one of which is the nature of the rights affected by application of a newly-enacted law. In evaluating the nature of the School

Board's rights in *Bradley,* the Court observed, by way of illustration, that in the past it "has refused to apply an intervening change [of law] to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 416 U.S. at 720.

Neither *Bradley* nor *Thorpe* support adoption of the narrow approach to manifest injustice advanced by plaintiffs. In those cases, there were no rights to protect. In *Bradley,* the Court concluded that the complaining party, a publicly-elected School Board, had *no right* in the funds allocated to it by the taxpayers such that it could be unfair to impose on it an additional financial obligation. In *Thorpe,* the Court found that application of the new regulation at issue to the Housing Authority's dealings with the petitioner "not only *does not infringe upon any of its rights,* but also does not even constitute an imposition." *Thorpe,* 393 U.S. at 283. Since there were no rights to protect in *Bradley* or *Thorpe,* neither case turned on whether the disadvantaged party could show destruction or impairment of a "vested property right."

Only one case since *Bradley* has addressed the manifest injustice exception to *Bradley. See Bennett v. New Jersey,* 470 U.S. 632 (1985). Despite the fact that the respondent in *Bennett* argued that the petitioners had no "vested rights," the Court found that the case fell within the manifest injustice exception to *Bradley.* Justice O'Conner simply identified the "fact that the Government's *right to recover* any misused funds preceded the 1978 Amendments. . . ." *Id.* at 639. The right was not characterized as "vested". It was not characterized as "mature". It was not characterized as "unconditional".

Plaintiffs argue that prior to the "final controlling judgment on the merits," which they claim occurred in 1986, Kaiser's rights and obligations were conditional and therefore not protected under the manifest injustice

standard. However, the right identified in *Bennett* was conditional in exactly the same way that plaintiffs claim Kaiser's rights in this case are conditional.

In *Bennett,* pursuant to a federal grant program started in 1970, states were given funds to be used in the public school system. In 1978, the law expanded allowable expenditures under the program. The federal government sought to recover funds it contended were misused in the 1970-72 grant years, pursuant to the regulations in effect prior to 1978. Whether the federal government had a right to recover any misused funds at all, regardless of the law to be applied, was the subject of the underlying litigation in *Bennett.* As here, the "final controlling judgment on the merits," establishing for the first time that the federal government could recover any misused funds, occurred *after* the 1978 change in the law. *See Bell v. New Jersey,* 461 U.S. 773 (1983). The case was then remanded to resolve whether the 1970-72 expenditures should be judged according to the law in effect at the time of the grant, or according to the revised standards enacted in 1978. On remand, the Court of Appeals for the Third Circuit, applying *Bradley,* held that the 1978 change in the law should be applied retroactively.

This Court reversed. The Court found that, prior to 1978, the federal government had rights which justified protection under the "manifest injustice" exception to *Bradley,* even though, according to the theory advanced by the plaintiffs here, the "final controlling judgment" which unconditionally established the existence of those rights occurred in 1985.

This Court's decision in *Bennett* refutes plaintiffs' assertion that a manifest injustice finding requires a showing that application of current law would destroy "vested property rights." *Bennett* also illustrates that Kaiser's rights in this case should be protected. This Court should reject plaintiffs' improper reliance on the notion of "vested property rights," as it is simply a

transparent attempt to tailor the *Bradley* standard to achieve their desired result.

c. Plaintiffs Misconstrue The Impact Of The Change In Law On Kaiser's Rights.

Plaintiffs deliberately misconstrue the inquiry under this third prong of the manifest injustice analysis. The Court in *Bradley* explained that the appropriate question is whether the person affected by the change in law, had he known of the additional or more onerous obligation, might have changed his conduct so as to avoid the new obligation. If so, application of the new law is manifestly unfair and the *Bradley* presumption does not apply. *Bradley* involved the obligation to pay attorneys' fees. Because attorneys' fees are inseparable from litigation of the merits of the claim, the only way to avoid the attorneys' fees obligation would be to alter the underlying conduct and avoid litigation completely.

By contrast, liability for postjudgment interest is completely separable from litigation on the merits and can be avoided by paying the judgment *to the plaintiffs*.[8] Thus, Kaiser made the independent decision to pursue its postjudgment remedies based in part on its consideration of the rate at which postjudgment interest was accruing on the judgment. As the district court found in this case, "Kaiser might have chosen to pay the amount of the judgment earlier had it reason to believe that interest after October 1, 1982 would compound at a rate of more than 6%." (P.A.47).

8. There is no support for plaintiffs' position that paying the judgment *into court* would stop the accrual of postjudgment interest.

CONCLUSION

The decision of the Court of Appeals should be reversed. The "*Bradley* presumption" in favor of retroactivity, which the court below applied in this case, directly conflicts with this Court's recent declaration that, in the absence of specific legislative direction, statutes "will not be construed to have retroactive effect. . . ." *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468, 471 (1988). In addition, even assuming the applicability of *Bradley* to this case, the court below erred when it failed to recognize that this case fits within all three of the exceptions to the "*Bradley* presumption". Finally, the court below measured interest from the date of a *verdict*, when the applicable federal statute mandates that interest run from "the date of entry of the *judgment*". 28 U.S.C. §1961.

Plaintiffs have refuted none of Kaiser's arguments. They have neither distinguished *Bowen* nor shown that *Bradley* was properly applied. Instead, they have dedicated their entire brief to the concept of "vested rights" – a concept which is not at all pertinent to this case.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR JR.), and BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF CROSS-PETITIONERS, BONJORNO, ET AL. TO OPEN ORAL ARGUMENT AND, IN SUPPORT THEREOF, TO PRESENT TO THE COURT A SUMMARY OUTLINE OF ISSUES AND THEIR POSITION FOR USE IN DETERMINING THE ORDER OF ORAL ARGUMENT, UNDER SUPREME COURT RULE 38, AND TO FACILITATE QUESTIONING BY THE COURT AT ORAL ARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR), and BARBARA K. CLISBY, Cross-Petitioners	:	No. 88-1595 (Kaiser's Petition)
vs.	:	No. 88-1771 (Plaintiffs' Cross-Petition)
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Cross-Respondents	:	(Consolidated for Purposes of Oral Argument on December 4, 1989)

MOTION OF CROSS-PETITIONERS, BONJORNO, ET AL. TO OPEN ORAL ARGUMENT AND, IN SUPPORT THEREOF, TO PRESENT TO THE COURT A SUMMARY OUTLINE OF ISSUES AND THEIR POSITION FOR USE IN DETERMINING THE ORDER OF ORAL ARGUMENT, UNDER SUPREME COURT RULE 38, AND TO FACILITATE QUESTIONING BY THE COURT AT ORAL ARGUMENT

Cross-Petitioners, Joseph A. Bonjorno, et al. ("Plaintiffs"), by their attorneys, Duane, Morris & Heckscher, and Henry T. Reath, senior counsel (who will present oral argument on their behalf), respectfully move Your Honorable Court to be permitted to open oral argument.

Plaintiffs seek leave to file with the Court the Summary Outline of Issues and Their Position, attached as Exhibit A:

¶ to assist the Court in determining, under Supreme Court Rule 38, which party will open argument on these Cross-Petitions;

- ¶ to facilitate the identification of issues and the positions of the parties in advance of oral argument; and
- ¶ to serve as a resource at oral argument to facilitate questioning by the Court.

In support of this Motion, Counsel for Plaintiffs states as follows:

1. On June 19, 1989 this Court granted the Cross-Petitions for Certiorari of Defendant Kaiser ("Defendant") and Plaintiffs, which have been consolidated for oral argument on December 4, 1989. Supreme Court Rule 38 provides that where there are Cross-Writs, "the Court will advise the parties which one is to open and close [oral argument]."

2. At issue on these Writs is the power of Courts of Appeals to award appropriate interest to a plaintiff, over an appropriate time period, to preserve the value of its award during delays in the judicial process where an initial damage award is recalculated at a later date and recovery is further delayed by post-trial motions and appeals.

3. Plaintiffs respectfully request that their Counsel be permitted to open oral argument, since the ultimate issue that this Court must address – the power of the Courts of Appeals to award appropriate interest (under Federal Rule of Appellate Procedure 37, as reinforced by equitable and inherent powers) – is presented in Plaintiffs' Cross-Petition.

4. Because of the volume of briefing and opinions on the issues presented (as noted below), and in support of this Motion, Counsel for Plaintiffs move to submit the

attached Summary Outline for use by the Court in determining, under Supreme Court Rule 38, the order of Oral Argument, and additionally, as a resource for the Court and Plaintiffs' Counsel, to facilitate questioning by the Court at oral argument.

5. This is a long and complex case, now in its sixteenth year, suit having been started in January, 1974. It has been heard before three juries, two different District Court judges, and has been before the United States Court of Appeals for the Third Circuit four times on appeals and once on a Writ of Mandamus. This Court had previously denied the Defendant's two prior Petitions for Certiorari filed in 1978 and 1985 before granting a Writ on the present Cross-Petitions.

The opinions on interest in the District Court and the Court of Appeals consist of a total of 77 reproduced pages, and Cross-Petitions for Certiorari and Replies, another 113 pages. Additionally, both sides have each filed three briefs for a total or an additional 211 pages.

6. Counsel for Plaintiffs earnestly believes and respectfully states to Your Honorable Court that, because of the importance of these issues and the extensive record and briefs, the attached Summary Outline serves several important purposes:

First, it will be of assistance to the Court under Supreme Court Rule 38 in determining the order of presenting opening arguments;

Second, it provides in one single, short document, a resource for the Court that identifies all the issues;

Finally, at oral argument, it will allow Plaintiffs' counsel to more effectively "emphasize and clarify the written argument appearing in the briefs theretofore filed," as provided under Supreme Court Rule 38 and will provide an effective way to save time and respond to questions by the Court.[1]

7. The attached Summary Outline is only a summary of the basic positions stated in Cross-Petitioners' three briefs, with footnotes that are cross-referenced to the briefs filed and opinions below. The Summary Outline contains no discussion, arguments or citation of cases not contained in Cross-Petitioners' three briefs filed with this Court.

Respectfully submitted,

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[1] Counsel is well aware that *"[t]he Court looks with disfavor on any oral argument that is read from a prepared text."* S.Ct.R. 38 (emphasis in original). The submission of the Summary Outline will allow counsel to avoid any lengthy oral summary and focus on responding to the specific concerns of the Court.

EXHIBIT "A"

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR), and BARBARA K. CLISBY, Cross-Petitioners	:	No. 88-1595 (Kaiser's Petition)
vs.	:	No. 88-1771 (Plaintiffs' Cross-Petition)
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Cross-Respondents	:	(Consolidated for Purposes of Oral Argument on December 4, 1989)

SUMMARY OUTLINE
OF
ISSUES AND POSITION OF CROSS-PETITIONERS
(Plaintiffs and Appellants below)

[Footnote references to briefs and court opinions are attached at the end of this outline.]

I. PRINCIPAL ISSUE BEFORE THE COURT:

In 1979, Kaiser's liability was established for having destroyed Plaintiffs' business. The amount of that liability was ultimately determined to be $9.5 million.

Since 1979, Kaiser has benefitted from the use of Plaintiffs' $9.5 million in an amount in excess of $18.6 million and has deprived Plaintiffs of that time value of money.

Plaintiffs seek an allowance of interest that will return to them that $18.6 million, whereas Kaiser seeks to retain the entire sum, except for one day's worth of interest.

II. PROCEDURAL HISTORY:

These are cross-petitions, by Plaintiffs and Defendant below, from an award of interest, on an underlying treble damage anti-trust award.

These appeals on which cross-writs were granted arose from Plaintiffs' 1986 Petition to the Court of Appeals for the Third Circuit for an allowance of interest, pursuant to Federal Rule of Appellate Procedure 37.[1]

III. THE TWO ISSUES BEFORE THE COURT: (1) TIME PERIOD AND (2) RATE OF INTEREST TO BE AWARDED.

1. TIME PERIOD During Which Interest Runs.

Where the Court of Appeals:

a) entered judgment in 1984,

b) reinstating a damage judgment entered in 1981,

c) that was based on a liability judgment in 1979, which the 1984 judgment also affirmed;

And where this Court denied certiorari in 1986,

When does interest begin to run?

a) From 1986 (after this Court denied certiorari on the substantive issues and Kaiser paid $9.5 million) as contended by defendant Kaiser?[2]

b) From 1981 (when the damages were fixed by the jury) as found by the Court below?[3]

c) From 1979 (when the liability judgment was entered) as Plaintiffs contend?[4]

III (continued)

2. RATE OF INTEREST TO BE AWARDED.

a) Courts of Appeals' Power to Award Appropriate Interest.

Do Courts of Appeals have power – as Plaintiffs contend[5] – to award an appropriate sum of interest, to preserve a damage award against loss in value, during delays in the courts?

Plaintiffs seek commercial market rate interest, monthly average prime, compounded monthly.[6]

b) The Federal Interest Statute for Calculating Interest on District Court Judgments.

If the sole authority for the Courts of Appeals to award interest is prescribed by the federal statute for calculating interest on District Court judgments (as found by the Court below and disputed by Plaintiffs)[7]

What statute applies?

1. The Repealed Statute, 28 U.S.C. §1961, in effect when the judgment was first entered (1979) – as found by the District Court[8] and contended here by Kaiser?[9]

   This statute provided for interest under state law (which Kaiser contends is 6% simple under Pennsylvania law)[10]

   or

2. The Current Statute, 28 U.S.C. §1961 as amended in 1982,[11] which was in effect when Plaintiffs' right to interest matured into a recoverable right (1986)[12] – as found by the Court below?[13]

   This statute provides for a fixed, non-fluctuating Treasury Bill rate compounded yearly.

IV. PLAINTIFFS' POSITION ON TIME PERIOD

Interest Should Run From The Date Liability Was Established (1979) Where The Final Award Of Damages Was Based On Facts Established In That Liability Finding.

1. The 1979 judgment was composed of 2 parts:

   a) The jury's verdict of liability which was never set aside, and which provided the factual basis for the 1981 damage award in an increased amount[14]

   and

   b) The damage award (which was set aside for a new trial limited to recalculation of damages as of 1977).

   Thus interest should run from the date when it was first judicially determined (1979) that defendant had intentionally damaged Plaintiffs.[15]

2. **Liquidated v. unliquidated damages:** The statements by the Court below that interest cannot run on an unliquidated amount[16] were in error and contrary to rulings of this Court.[17]

3. **Changes in amount of damages only:**

   a) Decrease in amount. This Court has held in *De La Rama* and other cases[18] that where the amount of recovery is reduced on appeal, interest runs on the recalculated amount from the original date when liability was established.

   b) Increase in amount. A fortiori, when the amount is increased, interest should run from the original date of liability.[19]

   The overwhelming majority of decisions by lower courts have so held.[20]

IV (continued)

4. **Stopping or reducing the running of interest:** Once liability was established, or at any time thereafter, defendant Kaiser could have stopped or reduced the running of interest by: (1) tendering into court;[21] or (2) paying Plaintiffs what it believed it owed.[22]

5. **The equities and four-fold purposes of interest reinforce Plaintiffs' position:**[23]

   a) Defendant has had the use of Plaintiffs' money since their liability was determined in 1979;

   b) Plaintiffs have been deprived since that date of the value of their award by an amount equal to defendant's benefit;

   c) Public Policy: It is against sound public policy and efficient court administration to allow and encourage parties to benefit financially from delays, while they exhaust their post-judgment judicial remedies.[24]

6. **Judicial errors or delay:** But for errors in law, or delays by the District Court judges in this case, Plaintiffs would have recovered their treble damage award as early as:

   a) 1977, (long before the date they are now claiming interest should begin to run), had the first judge not mistakenly directed a verdict for defendant;[25] or at least

   b) late 1979, had the second judge, instead of delaying two years,[26] promptly decided defendant's post-trial motions and scheduled the re-trial on damages

V. PLAINTIFFS' POSITION ON RATE TO BE AWARDED

A. Courts Of Appeals Have Power To Award Appropriate Interest To Preserve The Value of Their Orders, Judgments Or Awards They Reinstate.

1) **Policy considerations**: To vindicate the four-fold purposes of interest,[27] Courts of Appeals cannot be denied the power (inherent and/or equitable) to award appropriate interest on their judgments, or those they reinstate.[28]

2) **Sound Judicial Administration – Eliminate incentives for gain from delay**: Sound judicial administration requires that the courts be able to eliminate incentives for delay and financial gain by litigants exhausting their judicial remedies, where the interest awarded against them would be less than the time value of money.[29]

   This consideration was first recognized by the President of the United States in early 1979,[30] and later by the Congress in 1982, when it amended the old statute (28 U.S.C. §1961) for District Court judgments.[31]

3) **Rule 37 and §1912 Power**: The Courts of Appeals have power to award appropriate interest pursuant to Fed.R.App.P. 37 and 28 U.S.C. §1912.[32]

4) **Rule 37 and §1912 power – no conflict with federal District Court interest statute**: The Courts of Appeals' power to award appropriate interest (commercial market rates) does not conflict with the §1961 which is designed as a rule of convenience for calculating interest on judgments routinely entered in District Courts.[33]

V.A.4 (continued)

   28 U.S.C. §1961 as amended, subsection (c)(4), by its terms specifically does not "affect the interest on any judgment of any court not specified in this section."[34]

5) **Equitable and inherent power**: This Court has recognized that Courts of Appeals possess equitable[35] and inherent[36] powers to award appropriate interest[37] to do justice among the parties.

6) **Shortcomings of the Federal District Court Interest Statute**: The Court's power to award interest under Fed.R.App.P. 37 and 28 U.S.C. §1912 provides an important remedy to Courts of Appeals, because of major shortcomings in the statute for District Court judgments, 28 U.S.C. §1961.

   This is particularly so in long delays occasioned by the appeals process, where interest is awarded on reinstated or altered judgments over periods during which the Plaintiff is precluded from collecting on the judgment:

   First, §1961, being a rule of convenience, uses a fixed, rather than a floating rate – at Treasury Bill rates (2-3 points below prime) and compounded only yearly.[38] This difference in rates and compounding results in a significant shortfall from commercial market rates faced by business litigants.[39]

   Second, using the fixed rate can result in arbitrary and erratic swings. For example, in this case, as little as a 2 day difference in fixing the rate can cause a swing of as much as $4 million in interest.[40]

V.A (continued)

7) **Appropriate interest – commercial market rates**: The Court below should have exercised its power to award commercial market rates (prime, compounded monthly)[41] because:

a) Defendant's benefit: Defendant had the use of Plaintiffs' money since 1979, at market rates (in excess of $18.6 million).[42]

b) Plaintiffs' loss: Plaintiffs' cost of money was 2.5 points over prime, compounded monthly.[43]

Furthermore, had Plaintiffs received and invested the sums owed when due – not at Treasury Bill or savings account rates (as contended by defendant),[44] but in well-established, respected balanced or growth stock fund – the award could have appreciated to a sum worth today from 34 to 120 million dollars.[45]

B. **Defendant's Contentions That The Old, i.e., Repealed Version Of 28 U.S.C. §1961 (That Looks To State Rates) Applies To This Case Are Without Merit:**

1. **Appellate Court Power to Award Adequate Interest:** As discussed above, 28 U.S.C. §1912, Fed.R.App.P. 37, and the inherent and equitable powers of the courts mandate an award of interest adequately measuring the time value of money.[46]

2. **No retroactivity issue:** There is no issue of retroactive application of any law, as defendant contends,[47] where the right to recover is not determined (1986) until after the amended law takes effect (1982).[48]

V.B (continued)

3. **The *Bradley* Rule – Irrelevant:** The *Bradley* rule applying current law is not relevant where there is no change in law from the date of vesting to the date of decision (i.e. where the right to recover interest does not arise until after the amended law takes effect).[49]

4. **The *Bradley* Rule, if applicable:** would mandate following current law since defendant has not established a Congressional intent not to apply the repealed law, or manifest injustice if current law is applied.

a) No Congressional intent: No statutory direction or legislative history suggests that current law should not be applied.[50]

b) No manifest injustice: defendant's claims of manifest injustice are insufficient in law,[51] and devoid of facts[52] to support any such findings.

NOTES TO CROSS-PETITIONERS' OUTLINE

[1] Opinion of the Court of Appeals for the Third Circuit below, reprinted in Kaiser Petition for a Writ of Certiorari in No. 88-1595 ("Kaiser Pet.") A-7, 865 F.2d at 568; Brief for Respondents on Kaisers' Petition in No. 88-1595 ("Plaintiffs' Red Br.") at 5 & n.5; Reply Brief for Plaintiffs as Cross-Petitioners in No. 88-1771 ("Plaintiffs' Yellow Br.") at 12 & n.19.

The briefs filed in this Court are referred to as Kaiser's or Plaintiffs' "Blue," "Red" or "Yellow" to denote the color of each brief's cover pursuant to Supreme Court Rule 33.

[2] Brief for Petitioners in No. 88-1595 ("Kaiser Blue Br.") at 42.

[3] Kaiser Pet. A-14, 865 F.2d at 872; Plaintiffs' Blue Br. at 35-36.

[4] Plaintiffs' Blue Br. at 17-30; Plaintiffs' Yellow Br. at 2-11.

[5] Plaintiffs' Blue Br. at 14-15, 31-41; Plaintiffs' Yellow Br. at 11-15.

[6] Plaintiffs' Blue Br. at 7 n.11, 17, 41-45 & nn.71-72, 47; Plaintiffs' Yellow Br. at 17 & n.29, 19.

[7] Kaiser Pet. A-14 n.11, 865 F.2d at 872 n.10; *cf.* Plaintiffs' Blue Br. at 32-36.

[8] Kaiser Pet. A-45-50.

[9] Kaiser's Blue Br. at i.

[10] Kaiser Pet. A-15 n.12; 865 F.2d at 572 n.11.

[11] Kaiser Pet. A-23, 865 F.2d at 576.

[12] Plaintiffs' Red Br. at 14-20.

[13] Kaiser Pet. A-17-22, 865 F.2d at 573-76.

[14] Plaintiffs' Blue Br. at 3-5; Plaintiffs' Yellow Br. at 2-5.

[15] Plaintiffs' Blue Br. at 17-26 & nn.34, 36; Plaintiffs' Yellow Br. at 2-3, 6-9.

[16] Kaiser Pet. A-11, 12 & n.7, 865 F.2d at 570, 571 & n.6.

[17] Plaintiffs' Blue Br. at 19 & n.26; *Funkhouser; De La Rama; see also* Plaintiffs' Blue Br. at 27-28 (*Handgards*); *id.* at 29-30 (cases on changes in amount of award); Plaintiffs' Yellow Br. at 6-9 & nn.14-15.

[18] Plaintiffs' Blue Br. at 18-19 & n.25; Plaintiffs' Yellow Br. at 6-9.

[19] Plaintiffs' Blue Br. at 29-30; Plaintiffs' Yellow Br. at 6-7.

[20] Plaintiffs' Blue Br. at 24-25 n.36; Plaintiffs' Yellow Br. at 8-9 nn.14-15; *see also* Plaintiffs' Blue Br. at 20-22 & nn.31-32.

[21] Plaintiffs' Blue Br. at 5, 20 & n.29, 46; Plaintiffs' Red Br. at 3, 4-5 & n.4, 41 & n.49; Plaintiffs' Yellow Br. at 3 n.8.

[22] Plaintiffs' Red Br. at 3, 4-5, 41; Plaintiffs' Yellow Br. at 3 & n.8.

[23] Plaintiffs' Blue Br. at 13-17; Plaintiffs' Red Br. at 42-43; Plaintiffs' Yellow Br. at 1: the purposes of interest are to

- ¶ preserve judgments against diminution;
- ¶ prevent unjust enrichment of defendant at plaintiff's expense;
- ¶ vindicate the congressionally mandated policy to preserve free trade; and
- ¶ eliminate incentives for court delay after adverse judgments.

[24] Plaintiffs' Blue Br. at 16 & n.22, 43 n.70, 46; Plaintiffs' Red Br. at 42-43; Plaintiffs' Yellow Br. at 18.

[25] Plaintiffs' Blue Br. at 3, 18 n.23.

[26] *Id.* at 5 n.8; Plaintiffs' Yellow Br. at 4-6 & n.10.

[27] *See supra* n.23.

[28] Plaintiffs' Blue Br. at 31-41; Plaintiffs' Yellow Br. at 11-15.

[29] Plaintiffs' Blue Br. at 13, 16-17, 25-26, 33-34, 42-45; Plaintiffs' Yellow Br. at 18.

[30] Plaintiffs' Red. Br. at 34 n.39.

[31] *Id.* at 34.

[32] Plaintiffs' Blue Br. at 36, 40-41; Plaintiffs' Yellow Br. at 12 & nn.19-20.

[33] Plaintiffs' Blue Brief at 8, 35-36 & n.54, 38, 44; Plaintiffs' Yellow Br. at 12.

[34] Plaintiffs' Blue Br. at A-2; Plaintiffs' Yellow Br. at 12, 18.

[35] Plaintiffs' Blue Br. at 14-15, 36-40; Plaintiffs' Yellow Br. at 13 & n.21.

[36] Plaintiffs' Blue Br. at 14-15, 32-35; Plaintiffs' Yellow Br. at 13 & n.21.

[37] Plaintiffs' Blue Br. at 41-46; Plaintiffs' Yellow Br. at 15 & n.25.

[38] Plaintiffs' Blue Br. at 42-44.

[39] *Id.* at 8 & n.14; Plaintiffs' Yellow Br. at 16-18.

[40] *Id.* at 44 n.72; Plaintiffs' Red Br. at 48-49; Kaiser's Blue Br. at 10.

[41] The Court of Appeals below, without discussing Plaintiffs' request for market rate interest, dismissed it in a footnote as being "without merit." Kaiser Pet. A-14 n.11, 865 F.2d at 572 n.10.

[42] Plaintiffs' Blue Br. at 8 & n.14, 45; *see also* Plaintiffs' Yellow Br. at 16-17.

[43] J.A. 290-91; Plaintiffs' Blue Br. at 7 n.11; Plaintiffs' Yellow Br. at 16 & n.28.

[44] Kaiser's Red Br. at 16, 30.

[45] Plaintiffs' Yellow Br. at 2, 16 & n.28.

[46] Plaintiffs' Blue Br. at 47; Plaintiffs' Red Br. at 49.

[47] Kaiser's Blue Br. at 13-24.

[48] Plaintiffs' Red Br. at 14-20, 28-30.

[49] *Id.* at 14-15.

[50] *Id.* at 30-34.

[51] *Id.* at 35-42.

[52] *Id.* at 39-40.

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No. 88-1595 (10)
No. 88-1771 (9)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners and Cross-Respondents,

v.

JOSEPH A. BONJORNO, LORRAINE KERR
(EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.),
and BARBARA K. CLISBY,
Respondents and Cross-Petitioners.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION OF PETITIONERS TO RESPONDENTS' MOTION TO OPEN ORAL ARGUMENT AND TO SUBMIT "SUMMARY OUTLINE OF ISSUES AND POSITION OF CROSS-PETITIONERS"

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Petitioners Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") oppose the motion filed by respondents and cross-petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.), and Barbara K. Clisby ("respondents") which they have entitled Motion of Cross-Petitioners to Open Oral Argument And In Support Thereof To Present To The Court A Summary Outline Of Issues and Their Position For Use In Determining The Order Of Oral Argument, Under Supreme

Court Rule 38, And To Facilitate Questioning By The Court At Oral Argument.

Putting aside the initial question of whether the Rules of this Court allow cross-petitioners to file an application such as this, Kaiser's opposition to the motion is two-fold. First, Rule 38 should not be construed in this case to permit respondents to open oral argument. Second, respondents' "motion" is in fact an unauthorized supplemental brief which should be rejected as contrary to the Rules of this Court.

A. This Court Should Not Permit Respondents To Open Oral Argument.

Supreme Court Rule 38 declares the general rule that the "*petitioner is entitled to open and conclude the argument.*" (Emphasis added). The Rule further provides that in the event there is a cross-writ of certiorari, "the Court will advise the parties which one is to open and close." *Id.* Kaiser urges this Court to apply the general rule here and to permit Kaiser to open and close oral argument.

Respondents assert that the issue presented in their Cross-Petition is "the ultimate issue that this Court must address. . . ." Motion at 2, ¶ 3. However, this so-called ultimate issue was presented to this Court in a *conditional cross-petition* in which respondents sought review of the Court of Appeals' decision *only if* Kaiser's initial Petition was granted. If the issue presented in the Cross-Petition was not important enough to warrant an *unconditional* cross-petition, it is obviously not the "ultimate issue that this Court must address," as cross-petitioners suggest in their motion. On the contrary, the primary issues before this Court are the propriety of retroactive application of amended §1961 and whether postjudgment interest may be awarded from a date prior to entry of judgment. These issues were presented in Kaiser's Petition and briefs. Moreover, as the *only* party to file an unconditional petition, Kaiser should be permitted to open and close oral argument, pursuant to the first sentence of Rule 38.

B. This Court Should Not Consider Respondents' Outline.

Respondents concede that this Court has already received 324 pages of briefs addressed to the issues in the Petition and Cross-Petition. Nevertheless, respondents now seek to submit additional argument in a 12-page document they have appended to their motion, entitled "Summary Outline Of Issues And Position Of Cross-Petitioners."

Respondents' "Summary" should be disregarded by this Court as it is simply a disguised supplemental brief which does not conform to the Rules. The explicit terms of Supreme Court Rule 35.5 provide that a party may submit a supplemental brief *only* when it "desires to present late authorities, newly-enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief." The "Summary" submitted by respondents cites to no "late authorities," refers to no "newly-enacted legislation," and presents no "intervening matters that were not available in time to have been included" in respondents' briefs. Indeed, respondents themselves state that the "Summary Outline contains no discussion, arguments or citation of cases not contained in Cross-Petitioners' three briefs filed with this Court." Motion, at 4, ¶ 7. The "Summary" is simply an unnecessary rehash of all respondents' prior briefs and should therefore be rejected.

Respectfully submitted,

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